IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND
RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE., Et Al.

BRIEF FOR PLAINTIFFS IN ERROR.

HUGH T. TAGGART,
C. C. COLE, AND
LEO SIMMONS,
Attorneys for Plaintiffs in Error.

MILLER, LAW PRINTER, 615 E STREET N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE, ET AL.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The plaintiffs in error, who were plaintiffs in the trial court, filed their declaration in the Supreme Court of the District of Columbia, on September 7, 1899, against Joseph H. Moore and the members of the firm of Thomas J. Fisher & Co., to recover an undivided 91-100 part of lot 23, in Davidson's subdivision of square 166, in Washington City, claiming an estate in fee in the premises.

The defendants entered pleas of not guilty and issue was joined upon them (Rec., pp. 1-3.)

Mary Cecelia Thomson and Georgianna Hawkes Thomson, defendants in error by petition, prayed for

leave to intervene and be made parties defendants, averring that they were the owners of the property and that the defendants, Moore and Thomas J. Fisher & Co., were real estate agents, managing the property for them, the said petitioners were made parties defendants (Rec., pp. 62-63.)

The trial resulted in a verdict for the defendants; a motion of the plaintiffs for a new trial was overruled and judgment was entered upon the verdict.

On appeal to the Court of Appeals the judgment below was affirmed, from which this writ of error is prosecuted.

There were twenty-three assignments of error in the court below, based upon the exceptions noted in the record and were pressed before that court, yet in its opinion only three appears to have been considered. (Opinion, Rec., 133.)

The exceptions based upon the answer to the final interrogarory of witness Cooksey and on the motion for new trial on which error was assigned in the court below are abandoned.

Those of said exceptions upon which error is assigned will be numbered in consecutive order, as a matter of convenience, in this statement of the case.

It appears from the record that said plaintiffs claimed title under the heirs at law of William Thomson, Jr., who died in January of 1887, in Southampton, England (one of the plaintiffs is trustee for said heirs and the other claims a small interest in his own right (Rec., p. 34) and that said defendants claimed title by devise in an alleged last will and testament of said William Thomson, purporting to be executed in duplicate in England in February, 1886.

At the trial the plaintiffs gave in evidence, on their part, a stipulation of counsel for the parties, by which it was admitted that William Thomson, Jr., died in 1887, seized of said lot; that he was born in and continued a citizen of the United States; that he left no issue or decendents, and that the plaintiffs had acquired and held the title of the heirs (American citizens) of said Thomson to the extent of 91·100 part of said lot; and it being admitted that the defendants were in possession of said lot, claiming as life tenants under an alleged will, the plaintiffs rested (Rec., pp. 5–6).

Thereupon the defendants, for the purpose of establishing said will, read in evidence depositions of sundry witnesses taken in England under a commission, viz, those of Walter Randall Lomer and Richard Roope Linthorne, as to the preparation by said Lomer, and attestation by both of them of said alleged last will; and to the same being on file in the Probate Division of the High Court of Justice, in England. And that of Septimus Cooksey, as to the signature of John H. Cooksey, vice-consul of the United States at said Southampton, to an *official certificate* on the margin of said paper, under the *seal* of the consulate. Which official certificate was claimed by defendants to be part of the attestation of said will and to constitute the said John H. Cooksey one of the subscribing witnesses thereto; and of Robert Albion Pritchard and Walter Maxwell Lyte, as to said will and testament being on file in said High Court of Justice and as to its having been probated there; and those of William Gee Parker and John Dalton Venn, as to the photographing said certificate of said Cooksey.

Mr. Lomer testified, in substance, that he was a lawyer at Southampton, England, on February 24, 1886; that

for several years prior to that day he knew William Thomson by repute and by sight, but only made his personal acquaintance in that month ; that he and Linthorne, his articled clerk, witnessed a last will of said Thomson, at the request of said Thomson and in his presence and in the presence of each other ; that the will was in the handwriting of Edward Bone, another articled clerk then employed, at his, Lomer's, office, and was prepared by him, said Lomer, under instructions received from Thomson ; and that the "certified copy" accompanying the commision is a true copy of said will (Rec. pp. 7-9).

In reply to cross-interrogatories, the witness testified in substance : That Thomson first called at his office on February 15, 1886, when instructions were given in regard to the will ; that the will was signed in his office ; that he prepared two papers, viz, *the will in duplicate*, which were signed and witnessed by himself and Linthorne at the same time, viz, on February 24, 1886 ; that one duplicate was sent to the Probate Court at New York; that he did not know Thomson had been in an insane asylum in December, 1885, and so confined for a considerable time (Rec. 9-10). The witness also testified that after the papers were signed said Thomson—

> "Took the will in duplicate away with him, first giving me a receipt for them, and he then stated he *would attend before the consul general in London, and obtain the requisite certificate, and not trouble the vice-consul, Mr. Cooksey, in the matter;* but the next day he called and stated that he did not know when he would be in London again, and therefore had seen Mr. Cooksey and arranged with him to get the certificate, and he handed me his will in duplicate to have the form of certificate

engrossed thereon, which was then done and his will in duplicate returned to him" (Rec. pp. 10-11).

He further testified that he represented professionally, in England, the Misses Thomson, defendants to this suit (Rec. p. 11).

Mr. Linthorne's testimony was similiar in point and substance to that of Mr. Lomer, except that he stated he first met Thomson on February 24, 1886 (Rec. pp. 12-15).

It is apparent from the depositions of Lomer and Linthorne that neither copy of the alleged will was before them or the commissioner at the time they testified. Neither copy was produced at the trial, and no reason was given or shown for such non-production.

An alleged copy of the will given in evidence by defendants will be found on pages 24 and 25 of the record.

The copy so offered in evidence (Rec. p. 24) is not identified in any way by said witnesses, other than by the fact of its date, namely, February 24th, 1886. Later on it will appear from the other witnesses, who testified by deposition aforesaid, that it is not the same paper.

The paper referred to by said witnesses, Lomer and Linthorne, if executed by said William Thomson, was executed in duplicate. No excuse whatever is given for not producing either of said duplicates. From the evidence it will appear that the alleged duplicate, that was filed in London was taken around to various places to photograph an alleged certificate, purporting to be on the margin of said paper. But on what margin or what part of the paper is not shown. Why the alleged certificate should be photographed and not the whole paper is hard to conceive. It cannot be on account of the length of

same, if the copy offered in evidence was taken from it.

It appears from Lomer's testimony that when the paper was delivered by him to said Thomson, it was delivered as a complete instrument and attested by two witnesses only, viz. Lomer and Linthorne. And from the "Exhibit" certified by "A Musgrave, Register," which gives a copy of the certificate of John H. Cooksey, it appears that said certificate formed no part of the probate (Rec., pp. 23–24).

Septimus Cooksey testified in response to the interrogatories that he was a son of John H. Cooksey, formerly vice-consul of the United States at Southampton; that said Cooksey was such vice-consul on February 24, 1886; that deponent had frequently seen his father write and was familiar with his handwriting; that on May 16, 1900, deponent attended the Principal Registry of the Probate Division of the High Court of Justice; that the will of Thomson, dated February 24, 1886, was shown to him; that he examined particularly the certificate written in the margin of the second and last page and that the signature to said certificate was in the handwriting of his father.

It will be seen also that the copy offered in evidence is not identified by this witness. He testified about a will being on record in the London Court, and was asked to look at photograph marked "J. D. V. 1" and appended to the commission, and state who wrote and signed said statement set out on the photograph. The photograph referred to as "J. D. V. 1" is not in evidence. The only certificate in evidence which bears any resemblance to the one referred to by the witness is marked "J. D. V. 3" (Rec., p. 23).

First Assignment of Errors.

The interrogatories propounded to the witness, Pritchard, were each objected to by plaintiffs, before the commission was issued, as incompetent and irrelevant; the objections were renewed to each of them and objection made to the answers to each of them at the trial. The overruling of said objections and the permitting of the reading of said questions and answers in evidence, although severally excepted to, may be considered together (Rec. p. 18).

Mr. Pritchard testified, in substance, that he was a barrister at law and one of the registers of the Probate Division of the High Court of Justice; that his duties were "to examine, certify, *and sign wills*," and for that reason he had knowledge of the records of his office and of the original papers therein; that there was in said division a paper purporting to be the last will of William Thomson; that it had been probated in said division; that there is on the last page of the original will a certificate—

> "a true copy of which is photographed and annexed to the declaration of the notarial certificate of Mr. Venn,"

which is now produced to him; that there was no other certificate on the said will but the attestation clause signed by Lomer and Linthorne (Rec. 18–19); that the original of the photograph of certificate of John Henry Cooksey, "J. D. V. 1, *not J. D. V. 3*, as stated in the interrogatory," appears written on the second, which is the last, page of said will, and that the paper attached *to the interrogatories marked J. D. V. 2, purporting* to be a certi-

fied copy of William Thomson's last will and testament, had been compared by deponent with the original on January 15, 1901, and is correct in every particular (Rec., p. 19).

No cross-interrogatories were propounded to this witness. It will be noticed that the witness Cooksey says this original was shown to him May 16th, 1900, while this witness saw it near a year later, while Mr. Venn says the photograph was made April 23, 1900, (Rec., p. 20) and Mr. Gee Parker, who photographed it, says likewise.

The witness Prichard is the only witness that purports to give the contents of the certificate in his answer. It will be seen that said paper is designated by him also as "J. D. V. 1" and that the paper attached to the interrogatories marked "J. D. V. 2," purporting to be a certified copy of the will, etc. The witness states distinctly that he does not refer to paper marked "J. D. V. 3," the one in evidence.

Second Assignment.

The interrogatories to be propounded to Mr. Parker were separately objected to by plaintiffs, before the commission was issued, as incompetent, irrelevant and immaterial; the objections were renewed to each of them at the trial and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said questions and answers in evidence the plaintiffs excepted (Rec., pp. 19–20. These exceptions may be considered together and treated as one exception.

Witness Parker testified that he is a photographer; that he was called to make a photograph of the paper purporting to be a certificate, on Thomson's will; that the

will was brought to the place where the examination of the witness is being taken, 288 High Holborn, in the County of London, England, by gentlemen from the Probate Registry of the High Court of Justice, Somerset House, Strand County, of London; that witness personally made the photograph of said certificate *while the will and certificate was in his studio; the photograph was made April 23, 1900; that the photograph J. D. V. 1 is a facsimile of the certificate* as it appears on the original will; the original photograph is the same as is annexed to the notorial certificate of Mr. Venn, now produced before him by the commissioner, *marked J. D. V. 1;* and that the negative of the photograph is in witness' possession (Rec., 20-21). No cross-interrogatories were propounded to this witness.

This witness, "Parker" refers to a paper marked "J. D. V. 1;" not No. 3 as in the record. It will be noticed also, that this witness testifies that the paper purporting to be the will of Thomson was taken to his place of business. If taken out of the Registery at London, why could it not have been sent to this country? No excuse whatever is given for failure to do so. We again call the Court's attention to the unique practice of photographing one part of the paper for the purpose of evidence.

Third Assignment.

The interrogatories to be propounded to Mr. Venn were separately objected to by plaintiffs, before the commission was issued, as immaterial, irrelevant and incompetent; the objections were renewed to each of them at the trial, and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said questions and

answers in evidence the plaintiffs excepted (Rec., p. 21). These exceptions may also be considered together and treated as one exception.

Mr. Venn testified in substance that he was a notary public in London; was present and saw the certificate in the margin of William Thomson's will photographed April 23, 1900, and that the photograph J. D. V. 1, annexed to the interrogatories is the photograph so taken in his presence (Rec., pp. 21-22). In answer to the general interrogatory, he said:

> "I refer to my notarial certificate marked 'Exhibit A,' which is annexed to these interrogatories, which was granted by me on the 23d day of April, 1900, under my notarial seal and signature, which sets out all I know in connection with the photograph, and the will of said William Thomson; and also the certificate in the margin of the said will; and I confirm same in every particular."

No cross-interrogatories were propounded to this witness.

Again "J. D. V. 1" is referred to by the witness. And also Exhibit A.

What "J. D. V. 1" or Exhibit A contained is not shown by the witnesses' testimony. Neither paper being in evidence.

Fourth Assignment.

The interrogatories propounded to the witness Lyte were each objected to before the commission was issued, as irrelevent and incompetent, the objections were renewed at the trial and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said

questions and answers in evidence the plantiffs excepted (Rec., p. 22). These exceptions may be also considered together and treated as one exception.

Mr. Lyte testified that he was a "curl servant" employed as a clerk in the probate registry, that the duties of said office were the proving, registering, and custody of wills and granting letters of administration; that in said office is a paper probated as the last will and testament of William Thomson; that witness, "acting on instructions from the record keeper of the probate registry," on April 23, 1900, took said will to the studio of Mr. Parker, photographer; that he has looked at the photograph "J. D. V. 1" and that said photograph is "word for word" of the original certificate on said will (Rec., pp. 22-23).

No cross-interrogatories were propounded to this witness.

Again "J. D. V. 1" is referred to by the witness and what it contains is not in evidence.

Fifth Assignment.

The defendants then read in evidence, over plaintiff's objection, a paper marked "J. D. V. 3" (Rec., p. 23), entitled:

> "'Exhibit from the Principal Registry of the Probate, Divorce, and Admiralty Division of the High Court of Justice.' The following is a copy of a certificate written on the second page of the original will of William Thomson, deceased, proved in this registry the 25th day of January, 1887, but which forms no part of the probate thereof."

Then follows a copy of a certificate signed "John H. Cooksey" and a certificate of "A. Musgrave, Register," that the copy had been compared with the original and was a true copy thereof (Rec., pp. 23-24).

Nothing is said about Mr. Musgrave's authority to certify this paper and whether he was a Registrar of Births and Deaths, Suicide, etc., or Registrar of Wills does not appear. Besides the certificate is wholly incompetent if he were a Register of Wills.

By Sec. 905 R. S. U. S.

In order to admit any foreign record the Register must certify to the transcript, then his authority must be certified to by the Judge of his Court, and then the Register must again certify that the Judge is such officer.

Sixth Assignment.

The defendants then read in evidence "a paper purporting to be a copy of the last will and testament of William Thomson, Jr." (Rec., pp. 24–26).

It will be seen by the record that this paper is in no way identified as the paper referred to by any of the witnesses and whether it is the paper or not, it is impossible to know from the evidence that was before the court and contained in the record in this case, and further, that the title was left in William Thomson, Jr., while the paper purports to be William Thomson.

To the introduction and reading of this paper in evidence the plaintiffs objected for reasons stated, and to the overruling of the objection the plaintiffs excepted (Rec., p. 26).

The record states that—

"the defendants offered no further or other evidence in relation to said alleged will or the execution thereof, and thereupon announced their case closed."

It will be seen by the objections to the copy of the alleged will (Rec., p. 39) that they are pointed to the absolute want of evidence to support the admissibility of this paper.

PLAINTIFFS' EVIDENCE IN REBUTTAL IN RELATION TO SANITY.

In rebuttal of the defendants' evidence as to the sanity of said William Thomson and his competency to make such will, the plaintiffs read the depositions of Anne Lowman and Fred E. Hiscock.

Witness Anne Lowman testified in substance as follows: That she lived in the County of Southampton, England; that she knew William Thomson; that she was employed by him as housekeeper from 1882 to March, 1886; was in his employ in December, 1885; that he was in that month taken to the Laverstock House Asylum, because he was insane; that she thought he was insane because he stuffed paper and straw inside of his clothes and asked deponent and her mother, who was staying there to protect her, to set him on fire; that he tried several times to jump out of the windows, and all the windows had to be shut up and barred and secured; that he threatened deponent's life and talked of all sorts of nonsense; that he wrote letters to several persons without meaning, and that in order to quiet him deponent on several occasions made up a fur rug and put it in his bed and told him it was a baby; that he mixed food and drink, ate with his hands and behaved generally like a

madman; that said Thomson remained in said asylum from about December 16, 1885, to February 1, 1886; that she remained in his service until some time in March, 1886 (Rec., pp. 26–27). The alleged will bears date February 24th, 1886.

Seventh Assignment.

Being asked when and why she left him, she answered:

> "I left him some time in March, 1886, because Dr. Scott, his medical man, said it was not safe for me to stay there."

On objection of the defendants the words of the answer, "Dr. Scott, his medical man, said," were stricken therefrom by the court, and plaintiffs excepted (Rec., pp. 27-28).

Eighth Assignment.

The deponent further testified that while Mr. Thomson was at home she saw him daily and several times a day; that she waited on him; and in answer to interrogatory 17, the witness said:

> "Mr. Thomson went away on a holiday soon after he returned from the asylum, and in the interval I saw very little of him, as my mother would not let me go near him."

On objection by defendants, the portion of witness' answer "as my mother would not let me go near him" was stricken out and plaintiffs excepted (Rec., p. 28).

> "That she saw very little of him, but from what she did see he was just as insane as before he went to the asylum, if not worse; that she did not know

by whom the person was sent who succeeded her as housekeeper, unless it was by Mr. Cunningham, who seemed to be looking after Mr. Thomson's affairs; that Mr. Thomson was more easily persuaded to act or *do things after his return from the asylum than before he went, and could have been cheated and taken advantage of by any person after his return;* that Mr. Cunningham was not much at Mr. Thomson's until after his return from the asylum; after that he spent most of the day there, sleeping elsewhere at night" (Rec., p. 29).

Witness Hiscock testified that he was employed as a clerk in the United States consulate for about six years, and was so employed in 1885 and 1886; that Mr. Thomson was taken to Laverstock in December, 1885; that he was very violent, insane, and was taken there for treatment; that he tried to *break up his furniture and spoke of things that were impossible to occur; that he returned from the asylum with two* men as guards; that his mind was not in as good condition when he returned as it was before; he would ask the same questions over and over again, and changed his ideas in all of his transactions within the first month after his return; that he changed his will and did not seem to be in the same condition of health, mentally or physically; thinks Mr. Thomson was easily influenced after his return from the asylum; Mrs. Lowman, then Anne Barter, left Thomson's employ in March, about one month after the date of the will, because she did not like to stop in the house with him.

Notwithstanding the evidence of these two witnesses, employees of Thomson, to the contrary, the court by the 7th Prayer of the defendants (Rec., pp. 57 and 58) and the charge (Rec., p. 66) told the jury that there was no

proof of insanity of the testator at the date of the making of the will.

Ninth Assignment.

The following question was here propounded to witness (Int., 34, Rec., pp. 30-31):

> "Who had charge of Mr. Thomson's affairs after he was sick?"

To which the witness replied:

> "I telegraphed the old lady Thomson, against Mr. Thomson wishes, (he?) saying that the wolves would be here in time."

To this answer the defendants objected and it was stricken out by the court, to which ruling the plaintiffs excepted (Rec., pp. 30-31.)

The plaintiffs then produced as a witness William A. P. Lane, an English lawyer, and examined him touching the English law on the subject of wills and the admission of insane persons into asylums.

Witness Lane testified in substance that under I Vict., Ch. 26, Sec., 9, only two witnesses were required to a will of real estate in England. The witness identified a volumn of British statutes, from which he read said section.

The section, which appears in the record, page 31,* provides—

> "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other

> person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The witness then testified in substance that the English statutes governed commitments to asylums (Rec., pp. 31–32) ; that there were two kinds of lunatic asylums in England, public and private asylums, both of which must be licensed ; the commissioners in lunacy issued licenses to private asylums and the county authorities to public asylums ; and that the commissioners in lunacy are appointed by the government and their jurisdiction extends throughout England (Rec., p. 32).

Tenth Assignment.

The following question was then propounded to the witness :

> " Now, what are the conditions of entrance of a patient—the reception of a patient—in an asylum " (Rec., p. 32) ?

The defendants objected to the question if the conditions were statutory, and further on the ground that the evidence was incompetent and that it was immaterial how the man was sent there.

A revised edition of the British statutes was produced containing what plaintiffs proposed to show by the witness was the law on the subject,, and to follow this up with proof that Cunningham had given one of the certificates required by the statute, as bearing upon the ques-

tion of undue influence by the latter, upon which the court excluded the question, sustaining the objection, and refusing to permit the witness to testify or the statute to be considered, and the plaintiffs excepted (Rec., pp. 33–34–35).

Dr. J. H. Manning, examined as a witness for plaintiffs, testified by deposition in substance :

That he had been a medical practioner for forty years and was the medical officer and licensee of Laverstock House, a private asylum near Salsbury, England ; that he knew William Thomson ; that he first heard of him through Dr. Scott, medical man in Southampton, who wrote witness, asking him if he could receive Thomson for treatment (Rec., p. 36), first saw said Thomson on December 15, 1885, when he was committed to witness' care ; witness' authority to receive him was an order from his (Thomson) cousin, Mr. Cunningham, supported by two medical certificates, one of Professor Aitken and one of Dr. Scott, copies of which are hereto annexed ; *that Thomson, when received, was suffering from Bright's disease, and was anæmic and feeble ; he was excited ; believed he was in New York and that several strangers were his friends, and his conversation was rambling and incoherent ; that he, witness, was of the opinion that the mania was the result of weakness, following disease of the kidneys and old age, and was not necessarily transmitted ; he had no hallucinations, but suffered from delusions ;* identifies three letters, one of December 15, 1885 ; one of December 16, 1885, and one of January 12, 1886, as having been written by him, witness, while Mr. Thomson was under his care, and says that the note referred to in one of them (Rec., 39) was written by Mr. Thomson, who handed it

to him to forward ; that Mr. Cunningham and Dr. Scott called to see Mr. Thomson once ; that with the consent of two justices a patient may be discharged on probation, under the act of Parliament ; under it Mr. Thomson was, on February 1, 1886, granted leave of absence, and on that day left with a medical man and an attendant (Rec., pp. 36-37) ; that, in the opinion of Dr. Scott and witness, said Thomson was so much better as to entitle him to be released on probation ; his delusions and incoherentness had quite disappeared ; Mr. Thomson was, in witness' opinion, quite capable of attending to ordinary business, *but it would have been unwise for him to undertake any extraordinary business ;* Mr. Thomson was finally discharged, as recovered, on June 26, 1886, when his probation expired (Rec., p. 37).

The plaintiffs offered in evidence the three letters referred to by Dr. Manning, but on objection by the defendants they were excluded (Rec., pp 39–40).

The plaintiffs then offered in evidence as tending to prove the insanity of the alleged testator and undue influence on the part of James E. Cunningham, one of the executors, in procuring the execution of the will, certain papers referred to on page 34 of the record and set forth in full on pages 40–43 of the record, the excution of which was, under the act, a prerequiste to the admission of said Thomson to said asylum ; said papers being the application of said Cunningham, for such admission of said Thomson, accompained by his statement as to the age and condition of said Thomson, of whom he claimed to be a cousin, and two medical certificate,s one of Dr. Aitken and the other of Dr. Scott, as to said Thomson"s insanity, based on personal examination of said Thomsom

and inquiry, and which papers were stated by Dr. Manning to be his authority under the statute for receiving said Thomson at said asylum.

Eleventh Assignment.

To the introduction of these papers in evidence the defendants objected in each instance; the objection was sustained and plaintiffs in each instance excepted (Rec., pp. 40–42). These exceptions may by considered together and are given one number.

William Thomson Weir, Jr., was then examined as a witness for the plaintiffs, and testified in substance as to the insanity of said Thomson and other matters, as follows:

That he had known William Thomson and said Thomson's mother since his (witness) childhood; that Thomson's mother would tear paper up and put it away as money, and allow no one to touch it; William Thomson used to come to the house of witness' father; that witness went to live with said Thomson in Southampton in February, 1885, about two years before his death, and remained at said Thomson's house until January 10, 1886; that in October, 1885, witness noticed that he (Thomson) wanted to get out of bed and go in the street without putting on his clothes; that upon being put back to bed he would again try the same thing; *between October 1, 1885, and December 15, 1885, he would try to pick hot coals out of the fire with his bare hands; he would blow out a candle and suck it, and if an attempt was made to take it from him he would get wild; he would sit up and get dressed, then would undress and get in bed and in a few moments arise and dress again and walk into the drawing room, bow and say "good evening," when there was no one there; would stuff his*

clothes full of paper and try to set them afire; he threw an ornament from the mantel through the dining-room window; had to have an attendant when he was taken out driving; upon going back to the house he would refuse to go in the house, had to drive him around the block several times before he would go in; when they undertook to force him to do anything he would get wild and pitch around and tear things; when his meals were brought they would have to put the food in his mouth; used to get him to sign checks to carry the house along; the president of the bank and Mr. Cunningham knew of the situation (Rec., p. 43); Mr. Thomson did not know what he was signing; checks amounted to about eight hundred dollars; money was expended for clerk hire and household expenses; witness left a full statement for Mr. Cunningham (Rec., p. 44)); *after Mr. Thomson became violent he was in charge of two men, one for the night and one for the day; he would often raise an umbrella and walk through the house when he was dressed and when he had his nightgown on; would go out in his underwear; he would go out in cold weather without being dressed;* Mr. Cunningham was at the house when Mr. Thomson was taken to the asylum; he was taken there at Mr. Cunningham's suggestion; Mr. Cunningham took charge of all Mr. Thomson's affairs when latter was taken to the asylum. The witness further stated that Mr. Thomson spoke a great deal about his (witness) mother, and in witness' opinion liked her very much; Mr. Cunningham invited witness to visit him, and Mr. Thomson, after Cunningham had gone, asked witness not to go; he said he did not want witness to mingle with those people (Rec., p. 44); that Mr Cunningham told witness that there was about thirty thousand dollars in the hands of Samuel

G. Thomson; he said the picture mentioned in the will and devised to be sold and the preceeds divided between Cunningham and the defendants was of the value of $10,000 (Rec., p. 45).

The witness further testified that the household effects of Mr. Thomson consisted of expensive furniture and lots of solid silverware; that witness made an inventory of them, of which he had a copy with him. He was then asked:

> "From taking that inventory that you have there, what would you consider the property worth?"

The defendants objected to the question on the ground that it had not been shown that the witness was an expert as to the value of silverware. They also objected to testimony by the witness showing what Mr Thomson considered it to be worth (Rec., pp. 44–45); the court refused to permit the witness to answer the questions and plaintiffs excepted (Rec., p. 47).

Twelfth Assignment.

The witness Weir further testified that the seal of the consulate was kept at the consulate and not allowed to go out; that he (witness) was at the consulate for about one year and had seen what was done at the office; the vice-consul had no office. Thereupon the following question was propounded to the witness:

> "Now, state whether or not, under the general form and custom of the office, Mr. Cooksey certified the papers" [referring to certificates as to signatures], "stating that the party who acknowledged was present when he was not present?"

On objection by the defendants the court refused to permit the witness to answer the question and plaintiffs excepted (Rec., p. 47).

The witness further testified that Mr. Thomson had made a former will just before being taken sick; that in the latter part of 1885 witness had this will in his possession and sent it to his father in America, who was one of the executors named in it; that Mr. Thomson had told witness just before being taken ill that he had made such will, and that witness would find it among his papers if anything happened to him; that the will was afterward returned to Mr. Thomson in England; that witness had made search for the will; had inquired of Mr. Cunningham's relations in England and at the Probate Court in England, but could not find same.

Counsel for plaintiffs then called upon defendants for the production of this will, on whose behalf counsel replied they had no idea of producing same.

The witness further testified that the will was witnessed by two witnesses only, that it left all the property to witness and his two brothers; that witness was a companion to Mr. Thomson; he did everything for witness, and wanted to educate him at a French school; it was his intention to send witness to school when he (Thomson) was taken sick; almost every place Mr. Thomson went witness went; he wanted witness to take his name; witness was constantly associated with him, and never saw him use tobacco in any way; the witness and his brothers took nothing under the new will.

William Thomson Weir, Sr., was then examined on behalf of plaintiffs and testified, in substance that he had known William Thomson for twenty-five years; that he knew William Thomson's mother; she was insane; that

she was in witness' house for ten or twelve years; that witness' wife and mother took care of her; that the former will of said William Thomson was in his (Thomson's) handwriting, and was attested by two witnesses only; that he had seen and examined it, and that none of the devisees mentioned in the last will were mentioned in the former; *and that in said former will testator had made provision for bringing his remains to this country for burial in the family vault at Trenton, N. J., where the father, mother and brothers were buried* (*Rec., pp. 48-49.*)

Plaintiffs then gave in evidence in futher rebuttal certain documents from the Treasury Department, being certain accounts rendered between July, 1885, and June, 1886, showing that charges had been made in the consul's office at Southampton for certificates to signatures of sundry persons and included in the receipts of said office.

And thereupon, for the only purpose of showing that the signature to the said certificate of the said John H. Cooksey was not intended to be that of a subscribing witness to the said alleged will, and for the further purpose of showing that the signature of testator did not oppear on the first page of the instrument on file in the Probate Divorce, and Admiralty Division of said High Court of Justice, purporting to be the last will and testament of William Thomson, plaintiffs gave in evidence a certified copy, made in 1887, of said instrument (Rec., p. 49.)

A. B. Richardson, superintendent of the Government Hospital for the Insane, and a physician who had made a specialty of mental diseases, was then examined by plaintiffs in rebuttal.

A hypothetical case stating the peculiarities of behavior of said Thomson, as disclosed by the testimony, and his

confinement in an insane asylum, was put to him and the witness was asked for an opinion based on such case as to the permanency of the mental disease of the subject, and in reply he answered that the symptoms stated had an element of dementia out of the ordinary character of acute mania, and that it would be impossible that there would not remain a certain amount of weakness of mind after the acute symptoms had subsided; that the greater the age at time of these attacks the more extreme the degree of feebleness after the attack (Rec., pp. 52-53). He was then asked for his opinion as to whether a person—

> "that had been so confined and shown the violent symptoms as described and indicated would be more readily influenced after such symptoms had subsided than he would while they were on him."

The defendants objected to any answer to the question, and the objection was sustained (Rec., p. 53).

The plaintiffs then announced their case in rebuttal closed.

The defendants then gave in evidence a deed from sundry heirs at law of William Thomson to the plaintiffs, conveying the real estate in controversy (Rec., p. 54) but for what purpose is not stated; they agreed that plaintiff had title (Rec., pp. 5 and 6).

Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Assignments.

The plaintiffs objected severally to the defendant's second, third, fourth, sixth, and seventh prayers; the objections were overruled and plaintiffs in each instance excepted (Rec., pp. 56-58).

The Court's attention is especially called to the 7th of these instructions, by which it will be seen that a part of the plaintiffs' evidence, after being admitted was taken from the consideration of the jury.

Eighteenth Assignment.

The court refused to grant the plaintiffs' fifth prayer, and in lieu thereof gave a prayer of that number, as set forth in the charge, by which said prayer as offered was modified, to which modification plaintiffs excepted (Rec., pp. 60-61).

Nineteenth and Twentieth Assignments.

The court refused to grant the plaintiffs' sixth aud eighth prayers, to which refusal the plaintiffs excepted in each instance.

ASSIGNMENTS OF ERROR.

1. The court erred in permitting the several questions aud answers thereto in the deposition of Robert Albion Prichard, a witness for defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 18–19).

2. The court erred in permitting the several questions and answers thereto, in the deposition of William Gee Parker, a witness for defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 20–21).

3. The court erred in permitting the several questions and answers thereto in the deposition of John Dalton Venn, a witness for the defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 21–22).

4. The court erred in permitting the several questions and answers thereto, in the deposition of Walter Maxwell Lyte, a witness for the defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 22–23).

5. The court erred in admitting in evidence over plaintiffs' objection the paper marked "J. D. V. 3," purporting to be a copy of an official certificate of John H. Cooksey, vice-consul, United States of America (Rec., pp. 23–24).

6. The court erred in permitting the paper purporting to be a copy of the last will and testament of William Thomson to be read in evidence to the jury over plaintiffs' objection (Rec., pp. 24–25).

7. The court erred in excluding from the consideration of the jury so much of the answer of Annie Lowman, a witness for plaintiffs, to the 15th interrogatory propounded to her in the commission, as stated that her reason for leaving her employment as housekeeper in the service of said William Thomson, in March, 1886, (just after the execution of the will of said Thomson) was that Dr. Scott, said Thomson's medical man, had said that it was not safe for her to continue in such service (Rec., p. 28).

8. The court erred in excluding from the consideration of the jury so much of the answer of said Annie Lowman to the seventeenth interrogatory propounded to her, as stated that the mother of the witness would not let her go near said William Thomson (Rec., p. 28).

9. The court erred in excluding from the consideration of the jury the answer of Fred Hiscock, a witness for plaintiffs, to the thirty-fourth interrogatory propounded

to him in the commission (Rec., pp. 30-31).

10. The court erred in excluding from the jury the testimony proffered by plaintiffs, through William A. P. Lane, an English lawyer, as to the requirements of the English law in regard to the admission of insane persons to asylums, and in that connection further erred in excluding from the jury any testimony of said Lane as to said law being contained in the volume of the British statutes produced at the trial (Rec., pp. 31-35).

11. The court erred in excluding from the consideration of the jury the copy of the application of James E. Cunningham, devisee and executor named in said will, for the admission of said Thomson to said insane asylum, and in excluding from the jury the copies of the medical certificates of Dr. Aitken and Dr. Scott in support of the same (Rec., pp. 40-41).

12. The court erred in sustaining the objections of the defendants to the questions propounded to William Thomson Weir, Jr., a witness produced for the plaintiffs, as to whether, under the custom of the consul's office, John Henry Cooksey, vice-consul, in certifying papers certified that the parties acknowledging the same were present when they were not so present (Rec., pp. 40-42).

13. The court erred in granting defendants' second prayer over plaintiffs' objection (Rec., p. 56).

14. The court erred in granting defendants' third prayer over plaintiffs' objection (Rec., pp. 56-57).

15. The court erred in granting defendants' fourth prayer over plaintiffs' objection (Rec., pp. 56-57).

16. The court erred in granting defendants' sixth prayer over plaintiffs' objection (Rec., p. 57).

17. The court erred in granting defendants' seventh

prayer over plaintiffs' objection (Rec., pp. 57-58) by which the jury were told that there was no evidence of insanity of the said Thomson, given by certain witnesses of the plaintiff, at the date of the alleged will, when in fact two of such witnesses had distinctly testified that there were acts of insanity during the whole of the month in which said will is alleged to have been made.

18. The court erred in refusing to instruct the jury as requested in plaintiffs' fifth prayer; that in considering the question of William Thomson's mental capacity they should take into consideration said Thomson's age and the insanity of his mother and uncle, and the age at which the latter were affected; and that the witnesses to the will apparently were strangers to the testator, and were not capable of judging of his mental capacity as well as those who knew him, such as a friend or an intelligent servant who had known him for years, and in modifying said prayer by excluding said request therefrom, as shown by the prayer numbered five in the charge (Rec., pp. 60, 72-3).

19. The court erred in refusing to grant plaintiffs' sixth prayer (Rec., p. 61).

20. The court erred in refusing to grant plaintiffs' eighth prayer (Rec., p. 61).

ARGUMENT.

First Assignment of Error.

The first assignment of error is based upon the exceptions severally taken to the overruling of the objections made by plaintiffs, before the commission issued, to each of the interrogatories to be propounded to Robert Albion Pritchard and to his answers thereto (Rec., pp. 18-19).

It is apparent on the face of the questions, and the fact is emphasized by the answers of the witness, that his examination was addressed to the proving by him of records of an office, a "probate registry," in which he was employed; and that according to such records the last will and testament of aWilliam Thomson was a part thereof, and that the same had been admitted to probate and was of record there. The witness does not pretend to have any personal knowledge of the execution by said Thomson of such will, or of any fact or circumstance connected therewith, except what he learned from such records.

The question was asked and allowed whether, on the last page of said will, there was "any other certificate" (there being no previous mention of a certificate of any kind); and, if so, he was required to state the contents thereof; and his reply was admitted in evidence, that there was such certificate—

> "a true copy of which is photographed and annexed to the declaration and notarial certificate of Mr. Venn, which is now produced before me,"

and he then gives the language of the Cooksey alleged certificate, whether from memory or from the notorial certificate of Mr. Venn does not appear. The witness had the benefit of this "notarial certificate of Mr. Venn" in giving his testimony, and what he said about it and what he said it showed went to the jury, but the notarial certificate itself did not go to the jury, nor did the photograph "J. D. V. 1."

The length to which the witness went in this connection in assuming and stating facts bearing upon the execution of the will, a matter he knew nothing about, will

appear from the following extract from his testimony:

> "I have looked at a paper marked 'J. D. V. 1' (not J. D. V. 3, as is stated in this interrogatory) (Rec., p. 23) purporting to be a photograph of certificate of John Henry Cooksey, vice-consul of the United States; and I say that the original of such photograph appears written on the second, which is the last page of the original will executed by William Thomson, and bearing the date of February 25, 1886; and which will was made by William Thomson, and attested by Walter R. Lomer, solicitor, Southampton, Hampshire, England, and Richard Roope Linthorne, his articled clerk; and I say that the original does appear exactly as it is described on said Exhibit 'J. D. V. 1'" (Rec., pp. 18–19).

The Court below says the alleged photograph "J. D. V. 1." was admitted in evidence (Opinion, Rec., p. 136) but how the court reaches this conclusion when no such paper was admitted and is not in the record is hard to conceive.

Mr. Prichard further states (answer to final interrogatory):

> "That he knew that the original will of William Thomson has been duly proved in form of *law, and the probate of it would be accepted as evidence in all courts of justice in this country*" (Rec., p. 19).

The witness is requested in one of the interrogatories to look at a paper marked "J. D. V. 2," which it is stated "purports to be a certified copy of the last will and testament of William Thomson," and he is asked to state "what said paper is," and in reply he states that

he has looked at it, and then he adds, "and I say that the paper is what it purports to be, a certified copy of the last will and testament of William Thomson," but by whom certified or by what authority does not appear; he further says that he has compared the paper "J. D. V. 2" with the original will of said Thomson and that it is "correct, word for word," with it.

The paper as to which the witness so testifies, viz., "J. D. V. 2," was not in evidence before the jury. The record discloses that all the evidence on the part of the defendants is contained in it, and the paper in question "J. D. V. 2," nowhere appears in it. The Court of Appeals erroneously assumed that it was.

That the testimony of this witness was incompetent and inadmissible (except as to the mere fact that a paper purporting to be the last will of William Thomson was in the office with which he was connected) and tended greatly to prejudice the case of the plaintiffs before the jury, is obvious.

> "IT SHOULD APPEAR BEYOND DOUBT THAT ERROR IN ADMITTING INCOMPETENT AND IMMATERIAL EVIDENCE DID NOT AND COULD NOT HAVE PREJUDICED THE RIGHT OF THE PARTY OBJECTING."

says this Court in

> Boston and Albany R. R. *vs.* O'Reilly, 158 U. S., 334.

Under the law of the District at the time of the execution of the will (1886) and of the death of the testator (in 1887), the fact of probate and record in England was

immaterial. Even if a duly certified copy of such probate had been offered in evidence, and it had shown an instrument executed apparently so as to pass land in the District of Columbia, such certified copy would have been inadmissible.

This proposition is fully sustained by the case of Robinson *vs.* Pickrell, 109 U. S., 608.

This position is not affected by the Act of Congress of July 9, 1898 (25 Stat., 246).

Campbell *vs.* Porter, 162 U. S., 478.

The suit in the case at bar was instituted in 1899 and is not affected by the Code.

Hence, as said by the court in Robinson *vs.* Pickrell, p. 112, proof of a devise of land in the District in ejectment—

> "must be made by production of the will in court and evidence of its execution by the subscribing witnesses; *or if the will be lost or can not be produced, the proof must be made by secondary evidence of its execution and contents.*"

The testimony of the witness was competent to neither of these requisites, even if the papers referred to had been in evidence, and necessarily tended to confuse and mislead the jury to the prejudice of the rights of plaintiffs.

The photograph in regard to which the witness testified and which he calls "J. D. V. 1" is identified by him as annexed to the notarial certificate of Mr. Venn in regard thereto, and this notarial certificate appears to have been itself marked "Ex. A," but neither the photograph nor the notarial certificate was in evidence.

If both the photograph and the notarial certificate of Mr. Venn, and also the alleged copy of the will referred to as "J. D. V. 2" had been in evidence, even then, in the absence of proof that the original or counterparts of the alleged will could not be produced, the evidence of the witness as to the contents of a part of it or the whole of it would have been inadmissable.

The alleged will, with its attestations, constitutes a mere private writing, and is to be dealt with as such. The instrument itself should have been produced and its execution proved by the subscribing witnesses, of whom it is not pretended that Mr. Pritchard is one. If not produced, there should have been a satisfactory showing of inability to produce it before parol evidence of its contents, in whole or in part, could properly be admitted.

The proceedings of foreign depositories or judicatories with respect to it were immaterial, and such proceedings were not competent evidence.

Robinson *vs.* Pickrell, 109 U. S., 608, 612.

> "To introduce into a cause a copy of any paper, the truth of that copy must be established and satisfactory reasons for the non-production of the original must be shown."

Smith *vs.* Carrington, 4 Cr., 70.
Clifton *vs.* United States, 4 How., 242.

If the law of England interposed an impediment to the production of the original will the fact should have been proved.

> "No court is to be charged with knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice."

Hanley *vs.* Donohue, 116 U. S., 1, 4.

Second Assignment.

This assignment is based in like manner upon the overruling of plaintiffs' objections made before the commission issued to each of the interrogatories to be propounded to William Gee Parker, and to the overruling of plaintiffs' objections made to each of the answers of the witness to the same (Rec., pp. 19–20, brief).

The questions to and answers of the witness are addressed to proving that a will of William Thomson was brought to his studio and that he photographed a certificate appearing in the margin of same, and that the photograph "annexed to the notorial certificate of Mr. Venn" now produced to him by the commissioner and marked 'J. D. V. 1' is a fac-simile of the certificate." the photograph in regard to which the witness testified and which he calls "J. D. V. 1" is identified by him as attached to a notarial certificate of Mr. Venn, which is "J. D. V 1" and so marked, as stated by the witness, and neither the photograph nor the notarial certificate of Mr. Venn was in evidence. If the notarial certificate of Mr. Venn, "J. D. V. 1," and the photograph annexed thereto had been in evidence, in the absence of proof that the original will could not be produced, the evidence of the witness as to the alleged part of it or even as to the whole of it was inadmissible.

See the authorities cited in the discussion of the first assignment. The matter will be further considered under the sixth assignment of error in relation to the admissibility of the paper purporting to be a copy of the will.

Third Assignment.

This assignment is based in like manner upon the overruling of the plaintiffs' objections, made before the

commission issued to each of the interrogatories to be propounded to the witness John Dalton Venn and to the overruling of the plaintiffs' objections made to each of the answers of the witness to the same (Rec., p. 21).

The testimony of this witness relates to the photograph in regard to which the witness William Gee Parker testified, and he refers to his (the witness) "notorial certificate marked Exhibit A, which is annexed to these interrogatories," and which he says was granted by him on April 23, 1900, under his "notorial seal and signature," which he says sets out all that he knows—

> "in connection with the photograph and the will of the said William Thomson, and also the certificate in the margin of the said will and I confirm the same in every particular" (Rec., pp. 21-22).

As has already been stated, neither this notarial certificate nor the photograph "J. D. V. 1" was in evidence.

The whole deposition was irrelevant and incompetent and should have been excluded.

Fourth Assignment.

This assignment is based in like manner upon the overruling of plaintiffs' objections made before the commission issued to each of the interrogatories to be propounded to the witness Walter Maxwell Lyte, and to the overruling of the plaintiffs' objections made to each of the answers of the witness to the same (Rec., p. 22).

The witness, a clerk in the "probate registry," testified that he had in his office "a paper probated as the last will and testament of William Thomson;" that acting on instructions from "the record keeper of the probate registry," witness took the original will to the studio

of Parker, where a certificate in the margin was photographed by Parker (Rec., p. 22, 23). And he identifies the photograph "J. D. V. 1" as the photograph to which he refers, and it is evidently that "annexed to the notarial certificate of Mr. Venn" referred to by Parker (Rec., pp. 22, 23), and by Venn (Rec., pp. 21–22).

The court's attention is especially called to this witness' statement (Rec., p. 23).

The photograph referred to was not in evidence, nor was it properly admissible in evidence under the authorities cited under the first assigument and the whole deposition was clearly irrelevant and immaterial.

> "IT SHOULD APPEAR BEYOND DOUBT THAT ERROR IN ADMITTING INCOMPETENT AND IMMATERIAL EVIDENCE DID NOT AND COULD NOT HAVE PREJUDICED THE RIGHT OF THE PARTY OBJECTING."
>
> Boston and Albany R. R. *vs.* O'Rielly, 158 U. S., 334.

Fifth Assignment.

The assignment is based upon the overruling of plaintiffs' objection to the admission in evidence of the paper "J. D. V. 3" certified by "A. Musgrave, register," purporting to be a "copy of a certificate written on the second page of the original will of William Thomson, deceased, proved in this registry" but "*which forms no part of the probate thereof*" (Rec., p. 23). This paper is in no way identified by any witness in the case.

If the paper had formed part of the "probate" of the will, the certificate of such probate would have been inadmissible under Robinson *vs.* Pickrell, *supra*, and

other authorities cited in the discussion of the first assignment, but, forming no part of the probate, what the registry shows is simply his volunteer statement, not under oath, as to the contents of a written paper and it should have been excluded in either view.

Sixth Assignment.

This assignment is based upon the overruling of plaintiffs' objection to the admission in evidence of a paper described in defendents' offer of the same in evidence as a—

> "paper purporting to be a copy of the will of William Thomson, late United States consul at Southampton, England " (Rec., p. 26).

No Proof of Contents of Either Duplicate.

"J. C. Hannew, register," certified that on the 16th of August, 1887, the copy was examined with the original will "deposited in this registry." (Rec., 26.)

What the place of deposit is and what authority Mr. Hannew had to make the certificate twelve years before this suit was filed, does not appear. This is immaterial, as the offer of defendants is of a "paper purporting to be a copy of the will" only, and does not extend in terms to Hannew's certificate; but whether the offer included the certificate or not, the paper was not admissable for any purpose.

The Court of Appeals (Rec., p. 136) speaks of a certified copy of the will as "J. D. V. 2"; but in fact there is no such exhibit in the record.

Furthermore, it appears from the answers of Lomer, a witness for defendants, to cross-interrogatories (Rec.. p. 10), and the answers of Linthorne, another witness for defend-

ants, to cross-interrogatories (Rec. p. 14), and who were the only witnesses on the part of defendants to the execution of the will, that the instrument was executed in duplicate and that both papers were given to Thomson. It was incumbent on defendants to produce both duplicates or account for their non-production.

The court below says the original will was probated in London and retained in the Registery of the court and was not available to be produced at the trial. There is no evidence of this fact in any part of the record and none was offered at the trial.

The original will was the best evidence, if it could be produced ; and the duplicate was the next best. The paper so admitted did not of itself alone prove the existence of such original will, or that it was a copy of such original, and Hannew's certificate, a mere volunteer statement, made twelve years before the beginning of the suit, was not evidence of either fact.

The giving of this paper in evidence is the only attempt made by the defendants to prove the contents of a will of said Thomson, and the paper so admitted is not referred to, connected with, or identified by any other testimony adduced on the part of the defendants, and was therefore inadmissable.

1 Thompson on Trials, Sec. 825.

The Court of Appeals. notwithstanding the fact that that this question was pressed vigorously, wholly ignored the same.

It follows that even if the existence of a will by said Thomson had been established by the defendants, there must be a new trial because there is no proof of its contents.

other authorities cited in the discussion of the first assignment, but, forming no part of the probate, what the registry shows is simply his volunteer statement, not under oath, as to the contents of a written paper and it should have been excluded in either view.

Sixth Assignment.

This assignment is based upon the overruling of plaintiffs' objection to the admission in evidence of a paper described in defendents' offer of the same in evidence as a—

> "paper purporting to be a copy of the will of William Thomson, late United States consul at Southampton, England " (Rec., p. 26).

No Proof of Contents of Either Duplicate.

"J. C. Hannew, register," certified that on the 16th of August, 1887, the copy was examined with the original will "deposited in this registry." (Rec., 26.)

What the place of deposit is and what authority Mr. Hannew had to make the certificate twelve years before this suit was filed, does not appear. This is immaterial, as the offer of defendants is of a "paper purporting to be a copy of the will" only, and does not extend in terms to Hannew's certificate; but whether the offer included the certificate or not, the paper was not admissable for any purpose.

The Court of Appeals (Rec., p. 136) speaks of a certified copy of the will as "J. D. V. 2"; but in fact there is no such exhibit in the record.

Furthermore, it appears from the answers of Lomer, a witness for defendants, to cross-interrogatories (Rec.. p. 10), and the answers of Linthorne, another witness for defend-

ants, to cross-interrogatories (Rec. p. 14), and who were the only witnesses on the part of defendants to the execution of the will, that the instrument was executed in duplicate and that both papers were given to Thomson. It was incumbent on defendants to produce both duplicates or account for their non-production.

The court below says the original will was probated in London and retained in the Registery of the court and was not available to be produced at the trial. There is no evidence of this fact in any part of the record and none was offered at the trial.

The original will was the best evidence, if it could be produced ; and the duplicate was the next best. The paper so admitted did not of itself alone prove the existence of such original will, or that it was a copy of such original, and Hannew's certificate, a mere volunteer statement, made twelve years before the beginning of the suit, was not evidence of either fact.

The giving of this paper in evidence is the only attempt made by the defendants to prove the contents of a will of said Thomson, and the paper so admitted is not referred to, connected with, or identified by any other testimony adduced on the part of the defendants, and was therefore inadmissable.

1 Thompson on Trials, Sec. 825.

The Court of Appeals. notwithstanding the fact that that this question was pressed vigorously, wholly ignored the same.

It follows that even if the existence of a will by said Thomson had been established by the defendants, there must be a new trial because there is no proof of its contents.

> "But whether the document whose contents in controversy be one which a statue requires to be in writing; or whether it be a contract put in writing by consent of parties; or whether belonging to neither of these classes, it be one whose meaning it is important for the purposes of justice accurately to collect—the policy of the law, independent of other reasons, requires that its original, if practicable, should be produced."
>
> 1 Wh. Ev. (2d ed.), Sec. 60.

There is no excuse or reason shown for the non-production of one of the duplicate papers alleged to be the will of William Thomson. The duplicate or counterpart which the witness Lomer says was sent to New York for probate, could have been produced without difficulty. In fact it will be presumed to be in their possession, for by the civil code of procedure of New York, it is provided that at the expiration of one year after the date of probate, the will shall be delivered to the executor or the devisees therein.

Civil Code of New York, Sec. 2635.

And see in addition to the authorities cited in discussion under First Assignment the following—

Riggs *vs.* Taylor, 9 Wh., 483.
Simpson *vs.* Dall, 70 U. S., 460.
Wood *vs.* Cullen Co., 13 Minn., 396.
Owen *vs.* Hull, 9 Pet., 264.
Weathered *vs.* Baskerville, 11 How., 357.

And, as to the like necessity for the production also of the duplicate will, or of accounting for its non-production as a foundation for secondary evidence of its contents, see 1 Wh. Ev., 74, where it is said:

"When, however solemn instruments are executed in duplicates or triplicates, all must be accounted for, so it has been intimated, when each has been executed by all the parties. Each is primary in respect to the other, and hence comes the conclusion that no one can exclude the other, and that one should not be received in the absence of the other, unless such absence should by some proof, however faint, be explained.

"It is undoubtedly true that where two testamentary papers are executed at the same time with the formalities required by law, they must be taken together to constitute the will of the testator * * * and both constitute, when read together, the will of the testator, as if all the provisions of both were contained in one instrument."

Crossman *vs* Crossman, 95 N. Y., 149.

"The proponents of either duplicate can undoubtedly be required to produce the other, so that both may be before the court for inspection, that it may be seen whether they are precisely alike or whether there has been any revocation." Ibid., 150.

"If there be duplicate originals of a deed all must be accounted for before secondary evidence can be given of any one."

1 Taylor Ev., p. 366.

In the High Court of Parliament, Phipps *vs.* Anglesey, 7 Bro. P. C., 443, it was held:

First. Where two wills are of different date, the last should be taken.

Second. Two inconsistent wills, of same date are both void for want of certainty.

Third. Two wills of same date not inconsistant are to be taken together as the last will of the testator.

See L. R. A. Rep., 37, 568, Note B, and Flemming *vs.* Flemming, 63 N. C., 209.

See also—

29 A and E. E. of law, 292, and authorities there cited.

The Alleged Will is not Attested by Three Witnesses.

It may be added that even if the paper admitted in evidence had been duly proved as a copy of the last will and testament of William Thomson; yet if it was not attested by three witnesses, and was, therefore, insufficient to pass real estate in the District.

It is obvious from the face of the paper that as executed on February 24, 1886, there were but two subscribing witnesses to it, viz, Lomer and Linthorne. The attestation clause, purporting to be subscribed by them is full, formal and complete, and contemplated only two subscribers, as is conclusively shown by the word "both" appearing in it.

It is also evident from the fact that Lomer who, it is alleged, prepared the will, was an English lawyer, and from the fact that but two witnesses were required by the law of England (both to be present and to sign at the time of execution) to a valid will of personal or real estate. That more than two were not contemplated is further conclusively shown by the testimony of said Lomer and Linthorne.

Lomer testified, in response to cross-interrogatories, that he and Linthorne signed the will as witnesses on February 24, 1886 (Rec., p. 9); and (Rec., p. 11) that after the signing of the papers he took his will and—

> "duplicate away with him, first giving me a receipt for them, and he then stated that he would attend before the consul general in London and *obtain the requisite certificate* and not trouble his vice-consul (Mr. Cooksey) in the matter; but the next day he called and stated to me that he did not know when he would be in London again, and therefore had seen Mr. Cooksey and arranged with him to get the certificate, and he then handed me his will in duplicate to have the form of the certificate engrossed thereon, which was then done, and his will in duplicate returned to him."

From this it appears that it was the procurement of an official certificate, the doing of an official act, only supposed to be desirable in connection with the will, which was contemplated by Thomson and by Lomer, and not the procuring of an additional subscribing witness thereto, but intended by them as a separate and distinct act wholly independent of the attestation.

This is still further evident from the form of certificate which, it is alleged, was written on the margin by Lomer who also wrote the attestation clause, and which, if intended as an attestation, would have been prepared in the full and complete form of the attestation of himself and Linthorne; and from the fact that it was executed by Cooksey in his official character and that to it he appended the *seal* of the consulate.

As it was not, therefore, in the contemplation of either

the testator or of Cooksey that such act of the latter was to be that of a subscribing witness, the *animus attestandi* was lacking, and there was in the case no evidence from which a presumption to the contrary could be drawn; the evidence was, as has been shown, to another and different intent.

The certificate was admitted by the court on proof of Cooksey's signature, upon the theory, that from its mere presence in the margin of the will—(whether top or side) the jury might presume that he signed as a subscribing witness, in the actual presence of the testator; but by the nature of the certificate and the only other evidence in regard thereto, the theory upon which the court acted was absolutely unwarranted. And under such circumstances, and in the utter absence of any proof tending to show directly or by inference that the act was done in the character of a subscribing witness, the certificate should have been excluded.

Clarke *vs.* Turton, 11 Vesey, Jr., 240, is directly in point. In that case, which was a bill in equity to establish a will, Sir William Grant, the master of the rolls, said:

> "Another objection was taken to the execution of the will; that the third signature was that of the vice-consul, the will being executed abroad, and the attestation of some such public officer is considered necessary to the validity of the act; that the attestation in this *instance was a mere memorandum by the vice-consul to operate as a certificate, a separate act in his public character and seal with his official seal, and therefore, it could not be said he subscribed as a witness.*"

Speaking of the above authority (Rec., p. 139) the Court of Appeals says:

> "Nor did the master of the rolls himself express any opinion as to the merits of this objection."

What did he (the master of the rolls) mean, when he said:

> "That the attestation in this instance was a mere memorandum by the vice-consul to operate as a certificate, a separate act in his public character and sealed with his official seal, *and therefore it could not be said that he subscribed as a witness.*"

The case at bar is identical and if the party making the certificate could not have been considered a subscribing witness, it is hard to see how it can be said that the master of the rolls did not express an opinion.

NO FACT IS PROVEN IN THE CASE TO JUSTIFY A PRESUMPTION THAT COOKSEY ACTED IN THE CAPACITY OF A SUBSCRIBING WITNESS; OR THAT HE SIGNED THE ALLEGED CERTIFICATE IN THE PRESENCE OF THOMSON.

The Court of Appeals says in its opinion:

> "The only element of an attestation wanting is, that it does not appear to have been signed by the subscriber as a witness at the request of the testator."

But the court will see as will be urged later that such is not the case, that there is no evidence of either fact, viz., the subscribing as a witness and signing in the presence of the testator. The seal of the consul being placed on his certificate as in the case of Clark *vs.* Turpin, *supra*, clearly indicates that he did not intend to act as a sub-

scribing witness. In order to supply both of these requisites the jury had to first presume he signed as a witness, and draw the further presumption upon the first that he signed in the presence of Thomson, as is required by our law.

> "Facts can not be inferred because a party is unable to prove them," says this court in Fulkerson *vs.* Holmes, 117 U. S., 401, see 405.

Giving to Cooksey's act the import of that of a subscribing witness to the will, as before mentioned, necessitated an indulgence in two inferences:

First. That he was such witness.

Second. That he did what the law required of such a witness, namely, that he signed the certificate in the presence of Thomson, *which would not be required of him in* making an official certificate under the seal of the consulate as he did in this case.

The evidence discloses no fact upon which these inferences could be based.

A presumption as defined in works on evidence is—

> "an inference as to the existence of a fact, not actually known, arising from its usual connection with another which is known,"

and it must be based upon a fact and not upon an inference, or upon another presumption.

> "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and must still more give way when in conflict with clear, distinct and convincing proof."

Fresh *vs.* Gilson *et al.*, 16 Pet., U. S., 327.

> " Wherever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

Starkie on Ev., 80.
United States *vs.* Ross, 92 U. S., 281.

The court below having improperly allowed the jury to draw a presumption from the mere fact of Cooksey's name appearing on the margin of the will, that he was a subscribing witness, they were then allowed to draw a further presumption upon this one, namely, that the signature of Cooksey was appended in the presence of the testator.

As to the requisites of a valid execution of a will and presumptions in relation thereto, the attention of the court is called to the following authorities:

Chase *vs.* Kittridge, 11 Allen, 49.

In this case Mr. Justice Gray, late of this court, after reviewing the authorities, both English and American, and among them Penels *vs.* Weyant, 2 Har., 501, on the question of presumption in determining whether or not the signature of the testator was appended to the will prior to the signing by the witnesses, said :

> " The Court of Queen's Bench in Roberts *vs.* Phillips, 4 El. & Bl., 450, held that the subscription of the witnesses need not be below the signature of the testator or the end of the will. And there is an early rule of Lord Chief Justice Trevor to the same effect. Peake *vs.* Ougly, Com. R., 197. But in each of those cases there was direct or circumstantial evidence that the names of the witnesses were signed after the testator's signature

> and in his presence. There is no intimation by the court that any presumption of valid execution would arise even after the death of the witnesses from subscription so placed, and Lord Campbell, who delivered the opinion of the court in Roberts *vs.* Phillips, afterwards concurred in the judgment of the House of Lords in Hindmarsh *vs.* Charlton, above cited."

The decree of the probate court was reversed, the court holding that the will could not be admitted to probate for want of proper execution.

In the case of Penel's Lessee *vs.* Weyant, 2d Har. (Del.), 506, the court said:

> "Now, by the law of Pennsylvania there was no necessity that the witnesses should subscribe the will in the presence of the testator, which our law makes necessary, nor is there any reasonable ground in this particular case to infer that the parties had any reference to the Delaware law at the execution."

And further (p. 507):

> "In the present case we see nothing which would justify the jury to find that these witnesses did sign in the *presence* of the testator and from which to infer a proper execution of the will."

Schouler on Wills, Sec. 348, foot of page 384:

> "*In no case will the presumption of compliance with the statutory formalities arise unless the will appears on its face to have been duly executed.*"

Jarman Wills, Sec. 86:

"*In no case will the presumption of compliance with the statutory requirements be made unless the will appears on its face to have been duly executed.*"

Boone *vs.* Lewis, 103 N. C., 40:

"*Where one signs his name on a will in the place where the subscribing witnesses usually sign, there is a presumption that he signed as subscribing witness, but the contrary may be shown.*"

In that case it was held that the third name was not that of a subscribing witness.

Peake *vs.* Jenkins, 80 Va., 293:

In this case the instrument was propounded as the will of J. and wholly written by H., being signed J. by H., and is attested by witness L. L. being dead, the instrument is probated on the testimony of H., as a subscribing witness. Held, the instrument was not attested persuant to the statute. H. did not subscribe as a witness and could not attest the will.

Monday *vs.* Monday, 15 N. J., Equity, 293·

"The attestation clause, with the signature of the witnesses, is prima facie evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with it."

Hollenbeck *vs.* Fleming, 6 Hill, 304:

"The subscribing witness is one who was present when the instrument was executed, and who at the time subscribed his name to it as a witness of the execution. (Henry *vs.* Bishop, 2 Wend.,

575.) He need not be present at the moment of the execution. If he is called by the parties immediately afterward and told that it is the deed or agreement, and is requested by the parties to subscribe his name as a witness, that will be enough. The execution by the parties, and the subscribing by the witnesses, are then considered as part of the same transaction." (Citing authorities.) "But, although the witness was present at the execution, if he did not subscribe the instrument at the time, but did afterward without the request of the parties, he is not a good attesting witness."

In Goods of Sharman, 1 P. and D., 662.

In this case the court say :

> "*When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterward adds his name, the court will not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness.*"

In the Goods of Wilson, 1 P. and D., 269 :

In this case, in speaking of a case where one witness signed at the bottom of a page after the word "witness," and the other names were found at the top of the next page under the following words, viz, "a cottage situated on George street in the parish of E., in the county of York," the court said :

> "A testamentary paper is not entitled to probate unless the court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature."

And in the case of Leroy, 3 Brad., N. Y., 227, where a person signed, intending to sign for another person, which person afterward signed himself, though there were two names, viz, father and son, appearing as witnesses to the will, the court refused probate, holding that the will had only one witness.

And in the Goods of Eyon, 3 L. R. P. and D. 92, the deceased executed his will in the presence of the witnesses, one of whom also made a mark in the attestation of the signature of the deceased; the second witness then wrote the names of the deceased and the witnesses opposite their respective marks, and also the word "witness," but he did not sign his own name. Held, that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid.

See, also—

Hindmarsh *vs.* Carleton, 8 House of Lords, 160.

In the case of Patterson *vs.* Ransome, 55 Ind., 402, the court said:

> "The witnesses are regarded in the law as persons thrown around the testator in order that no fraud may be practiced upon him in execution of the will, and to judge of his capacity. By our law, as we have seen, witnesses are required to attest and subscribe the will. It is their province to judge the mental soundness of the testator, and they are required in order that no fraud be practiced upon him; and this statute contemplates that both shall witness and attest at the same time as one and the same transaction. Separate as these transactions were, both in time and place, each of the witnesses knew nothing of what transpired at the time of the other; therefore the will was not properly executed."

McDonald *vs.* Needham, 61 Texas, 264.

In this case the court held that an officer taking an acknowledgment is not a subscribing witness.

See, also—

Chaffery *vs.* Baptist Mission, 10 Paige, 91.

Dunn *vs.* Dunn, 1 P. and D., 277:

In this case it appeared on the face of the will that the signatures of the witnesses were affixed to it (one of the signatures having the word "executor" before it) beneath the original attestation clause. Signature held not to be that of a subscribing witness.

The opinion of the court below as to the sufficiency of the Cooksey certificate as an attestation (Rec., p. 138) is not sustained by the case of Adams *vs.* Norris (23 How., U. S., 358) cited therein. The circumstances in the two cases are radically different. A careful examination of that case will show that the law under which it was applied is entirely different from the Act of Maryland, under which we are proceeding. The law of California at the time the will in that case was made, was under a custom that had been followed in that jurisdiction for many years.

The law did not require the formalities required by the law of the District. While it seems that it was necessary to have three witnesses to a will, under the Mexican law, yet by custom and usage in California, only two were required.

It will be seen by that case that Roberto T. Ridley, sindico Nathen Speare and Guillerno Hinckley, all subscribed distinctly beneath that of the testater and the

word "witness" is placed directly opposite their names. While the law there required the contents of the will to be known to the testator or that it be read in his presence yet the evidence showed that the testator did know the contents, and as said before, the signatures of the witnesses appearing in the place where they are found, immediately under that of the testator, the presumption might easily be drawn that the requirements of the law, namely, that the contents of the will was known to the testator, had been complied with. Besides it was fully proven that the custom of having only two witnesses to a will had been long recognized in that State.

It clearly appears from the opinion in the case that the question was left to the jury to decide whether or not by the custom prevailing in the State more than two witnesses were required. The court said:

> "The custom under consideration was one of general nature and its existence for the period must be assumed from the verdict of the jury. It is a rule of property prevailing in its application and necessary to be known in order that judicial administration shall be carried on."
>
> "The recognition of such a rule, if it exists was therefore, to be looked for from the supreme tribunals of the State of California. In the case of Panuad *vs.* Jones, 1 Cal., 497-505, the Supreme Court say: The custom with respect to the execution of wills, so far as the testimony goes, appears to have prevailed generally and for a long time in California. It may have been the universal practice from the first settlement of the country." In Castro *vs.* Castro, 6 Cal., 158, this observation is cited and the court say: "that it is shown from the testimony of various witnesses, that two (wit-

nesses to a will) were sufficient under the custom of California." The same fact is restated in the case of Tevis *vs.* Pitcher, 10 Cal., 465. Nor is such a change in the mode of transfer of property a singular fact in the history of the American States. Several cases are mentioned in the opinion of the court in Panuad *vs.* Jones, above cited, and a similar instance is mentioned in Fowler *vs.* Shearer, 7 Mass., 14.

The question under consideration (by the law of California at that time) was whether the testator understood the wording of the will. It was admitted in that case that the genuine signature of the testator, the Sindico, and witnesses appeared on same. Proof was also made that the testator had stated to various witnesses how he had devised his property, which was found to coincide with the will; and necessarily it is to be presumed, if a man knew how he had devised his property by will, he knew the contents of it. And as said before it might well be that Roberto T. Ridley, the sindico, was one of the witnesses, all of them having signed at the same time, immediately under the signature of the testator. The testator in that case by the words of the codicil, says he desired executing it in conformity to the laws of the Mexican Republic; the language is "do make and declare it to be my will and intention, in presence of the two Alcaldes of this jurisdiction, his secretary and two witnesses of assistance as follows" etc. The admission or declaration offered as evidence was competent testimony says the court.

But what a different case we have here; while it is a fact that the paper purporting to be a certificate "J. D. V. 3" which is relied on as supplying the third witness,

states that the testator attended before the subscriber and acknowledged the paper to be his will, this might have been done and the signature of Cooksey and his seal of office fixed while he was a mile away from Thomson.

The Court of Appeals on page 139, say:

> "The only element of an attestation wanting is that it is not stated to have been signed by the subscriber as a witness at the request of the testator."

The law specifically requires the witness to attest the will in the presence of the testator and the authorities hold that strict compliance with the requirements is necessary. There is no doubt that where the names of three witnesses appear in the proper place with other corroborated proof that the testator intended to devise property situated in a certain place, all the witnesses being dead, it may be presumed that he knew the contents of the will and that the law had been complied with. But in this case how can the presumption be indulged in?

The Court of Appeals say, in the statement of the case, (Rec., p. 135):

> "The certificate was written on the second and last page of the will and it is said in the margin of it, but whether this means alongside of any other writing or at the end of the will does not very clearly appear from the record."

Was it the duty of the plaintiffs in the case to show on what part of the will the certificate was? The copy of the certificate referred to was not attached to the will; it does not purport to be. It is claimed it was photographed as a separate instrument. How can any one know, who has not examined the original paper, if there be such, on what part this certificate is?

It clearly appears from the evidence of Lomer and Linthorne, the alleged subscribing witnesses, that if three witnesses were intended a third one was at hand at the time the two signed. The court below (Rec., p. 139) says: "Cooksey is charged with authority to take acknowledgments of deeds." He may also certify papers; Sec. 1707, R. S. U. S. The court further says "and may have been called upon to certify the will through mistake."

What becomes of the *animus attestandi*, if such be the case?

The evidence in this case shows that Thomson had only been out of the insane asylum a short time when it is alleged this paper was made; under such circumstances, the rule as to execution of wills should be adhered to more rigidly, as is said by the authorities, otherwise the requirements of the law as well be obliterated.

Matter of O'Dea, 84 Hun., 591.

It may be well to mention here the fact that plaintiffs offered in evidence a copy of a paper purporting to be taken from the records of the Probate Court in England (Rec., p. 49). This paper was offered in evidence only for the purpose of showing that the certificate of Cooksey did not appear on the original paper when certified by the register and the consul-general on May 5th, 1887. And for the further purpose of showing that the signature of Cooksey to the certificate was not considered by the English courts as the act of a third witness. And for the further purpose of showing that the signature of the testator did not appear on the first page of the will as certified in the testimonium clause. All of this was done for a specific purpose and was evidence for no other purpose.

Yet the Court of Appeals in an endeavor to avoid the defect of want of proof of the contents of the paper offered in evidence by defendants, say (Rec., p. 137):

> "An identical similar copy was subsequently introduced in evidence by the plaintiffs themselves in rebuttal."

If the paper being in evidence solely for the purposes named it was evidence for no other purpose.

Thomson on Trials, Sec. 834.
Walderon *vs.* Walderon, 156 U. S., 381.
Abbot *vs.* Pearson, 130 Mass., 191.
Kribs *vs.* Jones, 44 Md., 396, 409.
Irish Society *vs.* Bishop of Derry, 12 C and T, 641.

This evidence, if it tended to show anything, showed that there were only two witnesees to the alleged will. And it further showed a very suspicious circumstance; the testator certifies that he signed the will twice, namely, on both pages of same, while as matter of fact, his name does not appear on the first page of either paper.

If the evidence offered by the defendant was insufficient to show the contents of the paper, it should have been excluded at the time. And if error was committed in admitting same, it cannot be said that it would be cured by evidence offered on behalf of the plaintiff, for the specific purpose of rebutting or showing want of evidence in the case.

Seventh Assignment.

This assignment of error is based upon the striking out by the court, over plaintiffs' objection of so much of the answer of Annie Lowman (Thomson's

housekeeper) as gave as her reason for leaving Thomson's employment in March, 1886, the fact that Dr. Scott, his medical man, said "it was not safe for her to stop there."

The will is said to have been executed February, 24 and 25, 1886, and in the following month, and while Thomson was out of the asylum on probation and in charge of Dr. Scott and two guards, the witness is informed by the medical attendant, Dr. Scott, that it was not safe for her to continue in her employment, and for this reason she left.

The relation which Dr. Scott bore to Mr. Thomson was one of authority; the fact was one peculiarly within his knowledge and was one in respect of which it was his professional duty to speak, and it became her duty to act upon the statement.

Such a statement coming from one so employed about the house, in an ordinary capacity even, would have been admissible as part of the *res gestæ* of a situation which involved the sanity of Thomson,

Am. and E. E. of Law, Vol. 22, p. 802, duty of physicians, etc.
Beck *vs.* German Clients, 78 Iowa, 696.
Carpenter *vs.* Blake, 75 N. Y., 12.

The *res gestæ* is not limited to a particular moment, but depends upon the circumstances of each case, and in the present case covered the period, at least, which elapsed from Thomson's commitment to the asylum on December 15, 1885, until his final discharge on June 1, 1886.

Eighth Assignment.

This assignment is based upon the exclusion over plaintiffs' objection of so much of the answer of said

Annie Lowman to the "17th" interrogatory propounded to her as stated that her mother would not "let her go near" said Thomson after the execution of the alleged will (Rec., p. 28).

The mother was also an inmate of the house, and the answer was admissible under the doctrine of *res gestæ*.

Besides, it cannot be said such evidence is hearsay. There are no words here that were given to the witness by others. It was not that the mother said anything at all about Thomson, but on the contrary, the statement is that the witness was restrained from going near him.

Ninth Assignment.

This assignment is based upon the exclusion over plaintiffs' objections of the answers of Hiscock, a witness for plaintiffs, to the 24th interrogatory propounded to him under the commission. In response to the question, "who had charge of Mr. Thomson's affairs after he was sick," the witness answered:

> "I telegraphed to the old lady Thomson against Mr. Thomson's wishes," (he?) "saying that the wolves will be here in time" (Rec., pp. 30–31).

This remark of the testator, made before he was taken to the asylum and a short time before the execution by him of the alleged will, indicated his feelings towards his English relatives, who subsequently appear in the will as beneficiaries in the main of his estate. Standing alone, no reason is apparent why it was not a competent fact for the jury to consider as bearing upon the questions of mental soundness and undue influence at the time the will was executed, especially was it significant and important, in view of the further fact disclosed by the testi-

mony, that said Thomson had previously executed a will, *all in his own handwriting*, in which his English relatives, who are the principal beneficiaries under the will in question, were not mentioned.

In Throckmorton *vs.* Holt, 180 U. S., this court held that declarations of the testator not part of the *res gestæ* were inadmissible upon the issue of forgery or revocation of the will, saying, among other things, p. 573:

> "Although in some cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject."

Tenth Assignment.

This assignment is based upon the exclusion of evidence proffered by plaintiffs through Lane, an English lawyer, as to the requirements of the law of England in regard to the admission of insane persons to asylums and in refusing to permit said Lane to testify that the volume of British statutes produced at the trial contained such law (Rec., 31–35).

From the statute, which is general in its nature as applying to all insane asylums, both public and private, it appears that certificates as to insane condition of patients from medical men, based upon personal examination and inquiry, are made a prerequiste to the admission of such patients to such asylums, and that a failure to observe such rules are made a punishable offence. In addition to such certificates an application for such admission is required from a relative,

"No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must like other facts, be proved, before they can be received in a court of justice."

Hanley *vs.* O'Donoghue, 116 U. S., 1, 4.

"A volume of foreign statues when authenticated by an oath of a competent person is admissible."

Jones *vs.* Moffat, 5 S. & R., 523.
Watson *vs.* Walker, 23 N. H., 471.

"It appears to have been at one time considered that although an unwritten law might be proved by witnesses professing competent professional skill, yet the written law of a foreign State ought to be proved by a copy of the law properly authenticated. But the doctrine has been expressly overruled and it has now been decided in the House of Lords that foreign law must in every case be proved by a witness who is skilled in the subject though he may refer to foreign law books to correct or to confirm his opinion; the law itself can not be taken from any book."

2 Ph. Ev. (C. & H. Notes), 361.

Eleventh Assignment.

It was the intention of the plaintiffs to follow up the law by proof of the certificates of physicians Aitken and Scott and of Cunningham, made in the performance of a statutory duty. When the certificates and application were offered in evidence by plaintiffs they were excluded by the court on defendants' objection; this exclusion is the basis of plaintiffs' eleventh assignment. Dr. Manning

testified that Cunningham procured the admission of Thomson to the asylum; the certificates of Drs. Scott and Aitken accompanied his application; he knew the statements as to Thomson's mental condition made in them and adopted such statements, which indicated a thoroughly impaired mental condition of Thomson on December 15, 1885. He states in his application under date of December 12, 1885, that Thomson is a person of unsound mind; that the duration of his existing attack had been two or three months, etc. (Rec., p. 40).

The mental infirmity of Thomson had existed for the period of three months previously; yet, with an immediate previous history of five months of utter incapacity on the part of Thomson, as Cunningham knew, he and members of his family appear as principal objects of Thomson's bounty under a will of February 24, 1886.

These facts certainly had a bearing upon the question of undue influence on his part in obtaining the execution of such will, and should have been submitted to the jury upon the issue of undue influence.

Furthermore, as facts bearing upon the mental condition of Thomson at the time of the execution of the will, they would seem to be clearly within the *res gestæ*. The certificates were not volunteer statements, but were made under the compulsion of the statute. The proceedings did not become less part of the *res gestæ* because required by the statute; the fact that they were required by the statute more emphatically made them so.

The case of Ormsby *vs.* Webb, 134 U. S., 65, which the defendants relied on in the trial court, deals with a different situation, and has no bearing upon the question.

In that case one of the issues was undue influence on the part of Harriet C. Stewart, a specific and residuary

legatee under the will. The trial court refused to admit the evidence of a witness for caveators to the effect that, after the execution of the will, said Harriet Stewart, in response to a question as to why certain parties had been left something under a former will and excluded in the last one, said, "that they tried to prejudice the admiral (testator) against her," and that she "had had them left out of the last will on that account."

Exception was taken to this ruling and this court in dealing with the exception, held that the exclusion of the declaration was right; that if a proper foundation had been laid her declarations could have been proved for the purpose of impeaching or discrediting her as a witness for caveatees, but it was competent for no other purpose. "She was not the only legatee who was interested in the issues to be tried."

Letters of Mrs. Stewart written to counsel before the execution of the will, urging him to attend at once to its preparation and execution, were admitted (see Vol. 20 of records and briefs in this court, page 15). The case went to the jury with a comprehensive instruction upon the subject of undue influence (4th issue, ib., 66).

We submit that the action of the court below in excluding Cunningham's application for admission of Thomson to the asylum and the medical certificate sent by him with it finds no support in Ormsby *vs.* Webb.

See—

Davis *vs.* Calvert, 5 G. and J., 269.
Thaln *vs.* Bankshead, 99 Mass., 112.
Atkins *vs.* Sanger, 1 Pick., 192.
Davis *vs.* Mason, 109 Mass., 169.

The court below in the opinion (Rec., p. 141) say these papers were properly ruled out at the trial "especially in

view of the fact that it does not appear why the testimony of the physicians themselves might not have been taken." The court presumes that these two physicians, who it is shown, lived in a foreign country, could have been called upon to give evidence, while the non-production of original papers in the same country is excused and a presumption drawn that they could not be produced with no evidence whatever on which to base such presumption. It would seem that there is no difference between the findings of these physicians of the fact of insanity under the proof in the case and that of a lunacy proceeding. The law of that country fixed this mode of inquiry instead of a lunacy jury and if their proceedings were had under the law of that country, as shown by the evidence of the witness Lane, this finding stood in no other light than an inquiry authorized by law.

Twelfth Assignment.

This assignment is based upon the exception (Rec., p. 47) taken to the refusal of the court to allow the witness Weir, Jr., to answer the questions propounded to him in relation to the manner of executing papers or how certificates to signatures were obtained from the vice-consul in the absence of the consul at Southampton, England. The questions began on page 45 and end with the exception to the ruling on page 47. The evidence offered (Rec., p. 49) shows that it was the custom of the office to make certain certificates to documents, and that the consulate charged the sum of $2 each for such service and accounted to the Treasury Department for the amounts so received. While there appears to be but a single exception to the ruling out of all these questions, yet, if all are erroneously ruled out, which we contend is the case, the exception will apply to all.

Harrison *vs.* Hamner, 99 Ala., 603–606.
Gray *vs.* Elzroth, 10 Ind., App., 587–593.

The object of these questions, as is apparent from the record, was to show that the vice-consul had given such certificates as is found on the copy of the alleged will to other persons, and to ascertain what was his manner of doing so. The court seemed to be impressed with the idea that because the witness did not know the contents of the papers, any answer from him would be inadmissible; but we submit that this was not so. If it could have been shown by the witness that it was a common thing for the vice-consul, in the absence of the consul, to certify to such papers, when taken to the office, by anyone (a messenger in the consulate, for instance) without seeing the party who made the signature, it would certainly have been competent to go to the jury, as bearing upon the question whether or not Thomson, the alleged testator, was present when the certificate in the margin of the will was signed. The evidence, while doubtless slight, it seems to us was competent inasmuch as the jury were allowed to indulge in a presumption in favor of the alleged certificate without any evidence to support it.

Could the witness, by answering any one of the questions ruled out, throw any light upon the subject and enable the jury to judge of the probability or improbability of Thomson's presence, when he, Cooksey, made the certificate in question? If it could, then the answer should have been allowed.

> "It is well settled, if evidence is offered conducing in any reasonable degree to establish the probability or improbability of the facts in controversy, it should go to the jury."

Insurance Co. *vs.* Weed, 11 Wall, 438.

In the case of Plumb *vs.* Curtis, 66 Conn., 166, the court said :

> " Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the tryer in the determination of the issue.
>
> " Evidence is admitted not because it is shown to be competent, but because it is shown not to be incompetent.
>
> " No precise and universal rule is furnished by law ; the question must be determined in each case according to the teachings of reason and judicial experience."

Citing—

Insurance Co. *vs.* Weed, 11 Wall., *supra.*

The objection to the question is only because the witness did not know the character of the papers certified; not that it was incompetent or irrelevant.

If Cooksey had been in the habit of certifying to papers in which, by the form of the certificate, he made it appear that the person acknowledging was present, when in fact he was not, and it could have been proven by this witness that he did so but in a single instance, such evidence would have been proper for the jury to consider.

In the case of Lane *vs.* Mo. Pac. R. R. Co., 132 Mo., 19-24, the court said :

> " The quotations (authorities cited) serve to show, and it seems very clear, that evidence tending to show *intoxication in a single instance may go to the jury* and justify the inference by them of want of ordinary care," etc.

Citing—

Insurance Co. *vs.* Weed, *supra.*

The questions and answers ruled out (in this case) are stated in the opinion, at page 33, and the action of the court was held error sufficient to cause reversal.

And in the case of Trul *vs.* True, 33 Me., 367, the court said:

> "It was held that testimony can not be excluded as irrelevant which would have any tendency, however remote, to establish the probability of the fact in controversy."
>
> "A party seeking to prove or disapprove the proposition may proceed step by step, offering link by link."
>
> "Whatever is a condition, either of the existence or the non-existence of a relevant hypothesis, may there be shown."
>
> 1 Whart. Ev., (2d ed.) secs., 20-21.
> See, also, Dodge *vs.* Wiel, 158 N. Y., 346, 350.

In the case of Roberts *vs.* The Continental Ins. Co., 41 Wis., 326, one of the issues was whether the firm of G. & H., agents of the defendants, knew of an existing insurance in the Phœnix Company when they issued the policy of the defendant in suit and did not inform their principal and obtain its consent.

The following questions were put:

> "Q. Is there any rule as to the Continental that you follow when you insure a piece of property, with reference to the amount of insurance?" (Ruled out.)

"Q. Assuming the value of the property to have been to your knowledge $1,800 and no more with $600 insurance already on it, would you have put $1,200 more on it?" (Ruled out.)

The court said, page 328:

"If the questions might have tended in any reasonable degree to establish the probability or improbability of the fact in controversy, they should have been received."

Citing Insurance Co. *vs.* Weed, 11 Wall., *supra.*

For this error the lower court was reversed.

It seems to us that inasmuch as the court permitted this paper (notwithstanding its absolute want of identification) to go to the jury as the act of a witness, when the evidence showed conclusively it was not so intended, this evidence should have been admitted. It is not necessary to have consul-generals or even vice-consuls to witness wills. There were other witnesses at hand when the first two signed (Lomer's Ev.,) if three had been intended.

Thirteenth Assignment.

This assignment is based upon the exception taken to the granting of the defendant's second prayer for instructions (Rec., p. 56).

By said instruction the jury were told that in case they found the will properly executed (without regard to insanity or undue influence) the plaintiffs were estopped to claim title under certain of the heirs at law of the alleged testator.

That—

> "it appears in this case that those two would be entitled to 16-100 of the property, and as to that portion of said property they shall return a verdict *for the defendants, if the jury so find that the will* was executed to pass real estate in the District."

This instruction is extremely misleading, involving, as it did, a duty upon the jury to find two verdicts, one for the plaintiffs and one for the defendants, as well as to determine a matter of law, depending upon facts to be found by them.

Even if there had been any evidence to support the paper purporting to be a copy of the will, the most the court should have done was to say to the jury that if they found from the evidence that the signature of Cooksey was intended to be that of a subscribing witness, and that he signed in the presence of the testator, then the plaintiffs could not claim the interest that would have descended to William Thompson Weir and Thomas Haig; and should they so find, even if they found the testator incompetent to make a will or that the same was obtained by undue influence, the plaintiffs would only be entitled to a verdict for seventy-five one-hundredths of the property claimed.

The defendants can not escape the responsibility of this instruction. It was prepared by their counsel and it was incumbent upon them to see that it was without misleading and confusing features.

> United States *vs.* Jones, 8 Peters, 389, 414-5.
> B. & O. R. R. Co. *vs.* Thompson, 10 Md., 77.
> 2 Thompson on Trials, Sec. 2349, see p. 1706, foot of section.

In the case of Gordon *vs.* Richmond, 83 Va., 436, 442, the court say :

> "Indeed, any instruction calculated to mislead the jury, whether it arises from ambiguity or any other cause, ought to be avoided, and if given it would oblige the appellate court to reverse the judgment."

Thomas *vs.* State, 67 Ga., 766; State *vs.* Jones, 20 W. Va., 764, and Archer *vs.* St. Clair, 49 Miss., 345, are also to the effect that the court should not permit the jury to be confounded or confused by the language in which the instructions are couched.

Fourteenth Assignment.

This assignment is based upon the plaintiffs' exception to the giving by the court of the defendants' third prayer (Rec., p. 56). This prayer, it will be seen, declares that defendants' evidence made out a *prima facia* case and placed the case before the jury as if every essential requirement of the statute in relation to the execution of the will had been proved by competent evidence, and that unless the evidence for plaintiffs disproved it, they must find for defendants. The "preponderance of the testimony" referred to in the prayer was meaningless. It did not involve a consideration of defendants' testimony, for the previous portion of the prayer had practically eliminated that from their consideration. The court said:

> "The jury are instructed as a matter of law that the introduction of the will in this case by the defendants and the testimony accompanying same *constitute prima facie evidence that said will was signed by William Thomson and duly attested to pass real estate, etc.*

The words "*prima facie evidence*" should not be submitted to a jury.

2 Thompson on Trials, sec. 2327.
B. & O. R. R. Co. *vs.* Beasley, 7 Md., 312, foot of page.

As in the former instruction the court told the jury that the defendants had produced the will in evidence, when, in fact, a paper purporting to be a copy was all that was offered. And further told them, as a matter of law, that the will was duly executed. No case can be found where it was held that from the mere finding of the name upon the margin of a will, over an official seal which shows a mere acknowledgment, and without other proof a presumption of law arises that the person so signing meant to sign as a subscribing witness and that he performed the act of a subscribing witness as required by the statute.

The authorities are uniform to the effect that in order to raise a presumption of fact of due execution, the execution of the will must appear regular upon its face, and they say *in no case will such presumption of fact be indulged in unless the will appears upon its face to have been duly executed.* See authorities cited under the sixth assignment.

It is not allowable in any case to assume a state of facts not proved, and to direct the jury upon such assumption as this tends to mislead the jury.

Washington and Georgetown R. R. Co. *vs.* Gladman, 15 Wall., 401.
N. J. Life Ins. Co. *vs.* Baker, 94 U. S., 610.
11 Amer. and Eng. Ency. of Law, 1st ed. 250.

The most the court is permitted to do *when a will appears regular upon its face,* namely, *when the signatures of the witnesses appear under a regular attestation clause or in the usual or customary place beneath the name of the testator, under the word "witness,"* and the witnesses are dead, is to leave the whole question to the jury under proper instructions, stating the requirements of the law, so that they may find whether or not the requirements were complied with. The court told the jury in this case that there was *prima facie* evidence of due execution. *Prima facie* evidence is—

> "such evidence of a fact as in the judgement of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."
>
> Kelly *vs.* Jackson, 6 Peters, 222.
> Lovell *vs.* Drainage, 159 Ill., 203.

But how can it be contended that there was such evidence in this case? Where does the court find any evidence whatever to show that Cooksey was a subscribing witness? Could the court have said, if there had been no jury to submit the matter to, that the fact was proven? (Clark *vs.* Turtin, 11 Vesey J., *supra.*) *It can not be said that if there is no evidence to warrant a finding, the verdict of a jury would change the situation.* (Beyer *vs.* Lefevre, 186 U. S., 114). In the first place, they would have to presume that Cooksey meant to sign the will as a witness *against the positive evidence of Lomer and of Linthorne and of the certificate itself to the contrary,* then have to presume upon this presumption that he fulfilled the requirements of the statute in performing such act. Can it be said that a presumption based upon an inference will constitute *prima facie* evidence? Such a presumption is

not evidence at all. If circumstancial evidence is relied upon, the circumstances can not be presumed.

In the case of the United States *vs.* Ross, 92 U. S., 284, the court said:

> "Because 42 bales (of cotton) were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimants' bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting upon the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain.
>
> "Whenever circumstantial eivdence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

Starkie on Evid., p. 80, lays down the rule thus:

> "In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought too be made, the iaw requires that the latter should be established by *direct* evidence, as if they were the very facts in issue. It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and deduction form them and does not permit a decision to be made on remote inferences."

A presumption is only an inference drawn from some other fact proven or admitted.

Home Ins. Co. *vs.* Weed, 11 Wall., 441.

The evidence of Lomer and Linthorne is directly opposed to the supposition of Cooksey's being a subscribing witness. (See their evidence, record, pp. 7 to 15.) And a presumption can not be allowed against an established fact.

> "Presumptions are indulged in to supply the place of facts; they are never allowed against ascertained and established facts; when these appear the presumptions disappear."

Lincoln *vs.* French, 105 U. S., 617.

By the instruction complained of the jury were told that the introduction of the copy of the will, without any evidence accompanying it, showed the act of Cooksey to be all the law required. His (Cooksey's) act was separate and distinct—done upon a different day from that which the two alleged witnesses claimed to have signed, and the case as to him (Cooksey) stood as if *none of the witnesses had testified or been produced.* The burden is upon the proponents of the will to show by preponderance of the evidence that such paper is duly executed, and the heir at law may rest safely upon the presumption that the estate is cast upon him by descent until this be done.

Tyler on Ejectment, 495.
Lewis *vs.* Lewis, 11 N. Y., 224.
Delafield *vs.* Parrish, 25 N. Y., 10.

Yet by this instruction the burden is placed upon the heir at law to show that what the law required was not done, without any proof whatever from the proponents to show that in fact it was done.

Taking into consideration the circumstances of this case, was it proper for the court to tell the jury that the requirements of the law were *prima facie* shown. We do not believe that it will be seriously contended that where there be a doubt in any such case, it should not be resolved in favor of the heir at law. While the evidence shows that Cooksey did not subscribe as a witness, yet if it did not so indicate any question of doubt should have been left to the jury. The court decided it for them. It is said:

> "A court can not submit a question to the jury unless there is some evidence to support it, as they are not allowed to speculate upon conjectures or guess away established rights."

Michigan Ins. Co. *vs.* Bank, 9 Wall., 544

Fifteenth Assignment.

This assignment is based upon the plaintiffs' exception to the fourth prayer of instruction given on behalf of the defendants (Rec., p. 59).

Like the former two, the instruction does not speak of the paper purporting to be a copy of the will, but as the will itself, thus taken may all questions as to the existence or contents of the alleged will. Besides this instruction placed the burden upon the plaintiffs to show incompetency. It cannot be said that where such insanity as is shown in this case in an old person that this instruction was proper. The following authorities are that proponent should take such burden.

Hodge *vs.* Fisher, Pet. C. C., 163.
Mo. & Pac. R. R. *vs.* Brazee, 72 Tex., 273.

Wright *vs.* Wright, 139 Mass., 177.
Boynton *vs.* Meeker, 28 N. J. Law, 247.
Beasley *vs.* Dennison, 40 Tex., 416.
McGinnis *vs.* Kempsey, 27 Mich., 363.
Elliott *vs.* Welsey, 13 Mo. App., 19.
Perkins *vs.* Perkins, 39 N. H. 163.
Smee *vs.* Smee, 5th L. R. P. Div., 84.
Comstock *vs.* Hoblyne, 8 Conn., 254.
Delafield *vs.* Parrish, 25 N. Y., 10.
Taff *vs.* Hosmer, 14 Mich., 309.
Cromshield *vs.* Cromshield, 2d Gray, Mass., 524.

In the case of Ford *vs.* State, 35 L. R. A., 117 (Miss.) The case made was not near as strong as this and the court below was reversed for just such an instruction. See also great number of cases cited under this report.

All the authorities are to the effect that where violent insanity is shown to have existed a short time before the will was executed, as in this case, the burden is upon the proponents to show testamentary capacity at the time the will was executed. Under the circumstances of this case the most that could have been properly done in favor of the defendants was to submit the whole question to the jury without placing the burden upon either side. The insane delusions were clearly proven to have existed in the testator's mind for four months prior to and through the whole month in which it is claimed the will was executed.

> "Where delusions are once established it is incumbent upon the proponents of a will to show a valid act."

Brooks *vs.* Townsend, 7 Gill. Md., 31.

In the matter of O'Dea, 84 Hun., N. Y., 591, the court said:

> "In determining the capacity of the testator in this case, as his health was impaired by disease and he was at an advanced age, it is the duty of the court to scrutinize all the evidence relating to the circumstances attending the preparation and execution of the will, and under the rule laid down in Matter of McGraw, 9 App. Div., 372, by this court and under the circumstances there detailed, as well as the circumstances here detailed, it is the duty of the court in determining questions of testamentary capacity to look with greater care and solicitude into the case, and adopt a more rigorous rule where the decedent is weak and suffering than if he was in comparative health."

Was this rule followed in this case? No more favorable rulings could have been allowed, if the testator had been shown to be a giant or a warrior upon a field of battle the day he made the will. Yet such rulings were made in this case where the evidence showed a maniac on the verge of the grave, with a fatal disease.

Insanity once established is presumed to continue. 11 Am. & E. E. of Law, 1st ed., 156 and note 1.

In this case Dr. Richardson, the expert on mental diseases, testified that the hpothetical case stated (Rec., p. 52) indicated *dementia* (which is the worst form of insanity), *and on account of the age of the alleged testator it was improbable that the individual could be entirely well after the acute symptoms of excitement had subsided and that there would not remain a certain amount of weakness of mind.*

The evidence tended strongly to show disease of a permanent nature in Thomson. Such being the case and it being a conceded fact that insane delusions were shown to have existed only a short time before the date of the

excution of the alleged will, the placing of the burden of proof upon the plaintiff was unwarranted. See opinion in the case of Armstrong *vs.* State, 30 Fla., 170, where many authorities are collected, holding that where insane delusions are established burden of proof is shifted.

The evidence in this case shows that the insanity of Thomson *was the result of old age and Bright's disease* (Manning's evidence, Rec., p. 37). *It is a well-known fact that neither are curable, and it proved so in this case, for Thomson died within one year.*

In the case of Physio Medical College *vs.* Wilkinson, 108 Ind., 314, 318, 319, the court said:

> "The presumption as to the continuance of the insanity is one of fact, says an approved author, varying with the particular case, 2 Whart. Ev., Sec. 1253.
>
> "The rule as stated by this court in a case closely analogous, is that 'when it appears in proof that a person was at any given time of unsound mind (unless for some temporary transient cause) the legal presumption is that the state of mind continued until the contrary is made to appear.'
>
> "The rule does not apply to cases of occasional intermittent insanity, but does to all cases of apparent confirmed insanity of whatever nature.
>
> "State *vs.* Wilner, 40 Wis., 304.
> "Brooks *vs.* Townsend, 7 Gill., 10.
>
> "The complaint before us presents a case of mental unsoundness accompanied with and probably resulting **from infirmities of old age. There is no presumption, either of law or of fact, that passing years release from such impairment of reason."**

The case of Beaver *vs.* Sprague and Blake, 93 Iowa, 576, is to the same effect.

Furthermore, this instruction was also misleading, as being in conflict with the plaintiffs' fourth prayer as granted (Rec., p. 72), and was erroneous for that reason.

B. & O. R. R. Co. *vs.* Thompson, 10 Md., 77.
Haskins *vs.* Haskins, 41 Ill., 197.
Thompson on Trials, 2326 and 2327.
Pittsburg, etc., R. R. Co. *vs.* Krouse, 30 Ohio State, 222-240.
T. W. & W. Rwy. Co. *vs.* Morgan, 72 Ill., 155.

Sixteenth Assignment.

This assignment is based upon the plaintiffs' exception to the sixth prayer given for the defendant (Rec., p. 57.)

By this instruction the jury were also told that the will was before them. And further, that the proof of incapacity (temparary or permanent) at any time prior to the making of the will would not relieve the plaintiffs or parties assailing the will from the necessity of establishing incapacity at the time of the making it.

We submit that this instruction is erroneous, for by it the jury must necessarily infer that it mattered not to what extent the insanity was found to exist, it would still be incumbent upon the opponents of the will to show that Thomson was, on both the 24th and 25th of February, 1886, not of sound mind. There is no evidence offered by the proponents of the will to *show the condition of Thomson on the 25th of February, 1886*, the day after the paper is alleged to have been witnessed by Lomer and Linthorne.

It is clearly in conflict with the plaintiff's fourth prayer, even as modified by the court (Rec., p. 72). "*And that such insanity was of a permanent nature.*" By defendants' sixth prayer the jury were told that proof of incapacity at any time prior to the making of the will would "*not relieve plaintiffs from the necessity of establishing*" mental incapacity at the time the paper was executed. It is error for the court to give such conflicting instructions. Both can not be right, and clearly the one granted as modified by the court, on behalf of the plaintiffs, was more favorable to the defendants than the law permitted. This instruction, on behalf of the defendants, clearly swept away all rights of the plaintiffs under the one given in their behalf.

> "An erroneous instruction given for either side is not cured by another more accurate one given for the other side."
>
> Ill. Cen. R. R. Co. *vs.* Maffit, 67 Ill., 431.
> People *vs.* Casey, 65 Cal., 260.

An erroneous instruction is not cured by another instruction given in the case.

> Pittsburg R. R. Co. *vs.* Krouse, 30 Ohio, St. 222.

In that case the court said :

> "The error is not cured by a general instruction ; every charge should be predicated on the issues and facts of the case. A specific charge based upon particular facts which, if followed by the jury, causes an errorneous verdict and is not cured by a general charge."

In the case of Steinmyer *vs.* People, 96 Ill., the court said :

> "*It is true the instruction on the same subject given on behalf of the defendants laid down the law* correctly. But that was not enough, the jury may have disregarded the instructions for the defendant and followed those given for the people. They had as much right to follow the one as the other, and it is impossible to say which instruction controlled the deliberations of the jury. We are, therefore, of the opinion the instruction was calculated to deprive the defendant of a fair trial, and the judgment should be reversed."

To entitle an instruction to be given it must be correct in point of law.

> Thompson on Trials, Sec. 2349.
> Grand Trunk R. R. Co. *vs.* Latham, 63 Maine, 177.
> Snow *vs.* Penobscot Ice Co., 77 Maine, 55.
> Thompson on Trials, Sec. 2353.
> Jones *vs.* Talbot, 4 Mo., 279.
> Chapman *vs.* Erie R. R. Co., 55 N. Y., 579.

Furthermore, the prayer is argumentative. By this instruction the jury are told: "A testator has a right to make a will and dispose of his property as he pleases," and that "such right is among the dearest and most sacred rights of a citizen." However true these propositions, it is also true that the right of the heir is equally sacred and he has a right to controvert a will he believes to be invalid. The obvious effect of this statement made by the court must have been to create an impression on the minds of the jury adverse to the plaintiffs, and necessarily they took it as an intimation that the court was favorable to the will.

It is a well-known fact that juries are too apt to catch at any conclusion or inference thrown out by the

court and follow the same in rendering their verdict. A special instruction of this kind should not be given.

Thompson on Trials, Sec. 2301, and cases cited under note 1.

Seventeenth Assignment.

Special stress is laid on this assignment, for it clearly appears that the court was in error when it said "there is no evidence."

This assignment is based upon the plaintiffs' exception to the giving of the defendants' seventh prayer (Rec., p. 57). This prayer reads as follows :

> "The jury are instructed that, while non-experts have been allowed to express their opinions as to the mental capacity or incapacity of William Thomson, the jury should consider the opportunities of such witnesses to know William Thomson, and the reasons upon which the witnesses rest their statements of opinion as to William Thomson's sanity or insanity ; and they are further instructed that the opinion of a non expert witness as to the mental capacity of William Thomson is worth nothing as evidence unless supported by proof of facts and circumstances which, in the judgment of the jury, justify the conclusions reached by them. *They are further instructed that there is no evidence in this case of any opinion of any non-expert witness that William Thomson was, at the time he made the will, incapable of making a valid deed or contract ; nor is there any statement of any non-expert witness as to the mental capacity of William Thomson to make a valid deed or contract at the time said will was executed*" (Rec., p. 67.)

We presume that what was meant by the word "non-expert" was "non-professional" and non-subscribing

witness. As the only witnesses to the sanity of Thomson examined on behalf of the proponents of the will were Lomer and Linthorne, the alleged subscribing witnesses, it will be plainly seen that this instruction could have relation only to such non-expert witnesses examined on behalf of plaintiffs, and its effect was not only to detract from the force of the plaintiffs' evidence, but cut out and take from the consideration of the jury vital testimony given on behalf of the plaintiff of the condition of Thomson's mind at the time it is alleged he made the will.

The evidence given by Annie Lowman and Fred Hiscock shows that this instruction was absolutely unwarranted. Annie Lowman was employed by Thompson as a housekeeper from 1882 until March, 1886. By the copy of the alleged will given in evidence by the defendants it appears to have been executed February 24, 1886. After stating many acts of Thompson, indicating violent insanity, she says he was insane when taken to the asylum December 15, 1885. Dr. Manning's evidence shows he was released on probation on February 1, 1886, *in charge of attendants and returned home* (Rec., p. 37).

The answer of Annie Lowman to the 15th interrogatory (Rec., p. 28) was:

> "I left some time in March, 1886, because (Dr. Scott, his medical man, said) it was not safe for me to stay there. I saw him while he was at home daily, and several times a day. I waited upon him.
>
> "Q. Did he act as he had acted prior to his being taken to the asylum? A. I can not say, as I then saw very little of him, but from what I did see I thought him just as insane as before he went to the asylum, if not worse.

She futher states—

> "that any person could have cheated him or taken advantage of him after his return from the asylum. He was more easily persuaded than before he went away." (Rec., p. 28.)

Now, while this witness does not say or speak of the condition of Thompson, either on the 24th or 25th of February, the dates it is claimed that the alleged will was executed, yet her testimony bears directly upon his condition in the month of February, the time the paper is alleged to have been made. Even Cunningham seems to have been afraid to remain in the house with him *while he was looking after his affairs.*

> "*James E. Cunningham was not at the Thomson house until after his return from the asylum; after that he spent most of the time there, sleeping elsewhere at night.*" (*Annie Lowman's testimony*, Rec., p. 29.)

The witness Hiscock (Rec., p. 29), a clerk employed by Thomson in the consulate, had been so employed for about six years when Thomson became insane (Rec., p. 29). He says Thomson was insane when taken to the asylum, and states his violent acts. He does not remember the date of his return from the asylum; *says Thomson returned with two men as guards: do sane men go about accompanied by or under guards? When were these guards discharged, certainly not before June, 1886. The witness says: he was not in as good condition when he returned as before he was taken sick.*

> "Q. What did he do for the first few days after his return?

"A. He asked me questions over and over again.

"Q. What did he do in the first month after his return from the asylum that would indicate his condition? (Month the alleged will is dated.)

"A. He changed his ideas in all his transactions. He never appeared to be in his normal condition again, mentally or physically." (Rec., p. 30.)

This evidence clearly related to Thomson's mental condition and his competency to make a valid deed or contract, and covered the time when the alleged will was executed.

In the predicament of the evidence the instruction was wholly unwarranted and erronerous.

> "A trial judge must not single out isolated parts of the testimony and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it; especially he ought not to review only those facts which have a tendency to establish one side of the case."
>
> Thomson on Trials, Secs. 2345, 2330.
> Penn. R. R. *vs.* Lieb, 33 Pa., 318.

It is not allowable to assume as existing, facts not proved, and to ask a direction to the jury upon such presumption. This practice would tend to embarrass and mislead the jury.

> Wash. and Geo. R. R. *vs.* Gladman, 15 Wall. U. S., 401.

See also—

N. J. Life Ins. Co. *vs.* Baker, 94 U. S., 610.

Courts should not assume, in their instructions to juries that material facts upon which the parties rely are established unless they are admitted or the evidence respecting them is not controverted.

Bank *vs.* Hunt, 11 Wall., 391, 394.
Rehr *vs.* Conn. Mutual Life Ins. Co., 4 Fed. Rep., 362.

When there are disputed facts from which others may or may not be inferred, the court should submit them to the jury.

Maynard *vs.* Lumberman Nat. Bk, 11 Atl. Rep., 529.
Michigan Ins. Co. *vs.* Bank, 9 Wall., 544.

Eighteenth Assignment.

This assignment of error is based upon the refusal of the court to grant the plaintiff's fifth prayer (Rec., p. 60), and to the modification thereof (Rec., p. 72). The prayer as offered is in the following language:

V.

"The jury are further instructed that because a person can correspond with a friend or relative intelligently and carry on or attend to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will. That in considering the question of his mental capacity, they should take into consideration all the surroundings as disclosed by

the evidence, the AGE OF SAID THOMSON AND THE INSANITY OF HIS MOTHER AND UNCLE AND THE AGE AT WHICH THEY WERE AFFECTED. *The witnesses to the will were apparently strangers to the testator and therefore not capable of judging of his mental capacity so well as one who knew him, a friend or intelligent servant, for instance, who had known him for years; persons of unsound mind often succeed in controlling their actions to such an extent that all their outward appearances are rational and often their malady is not only successfully concealed from nonprofessional observers but from the experienced eyes of physicians.*"

The prayer given is in the following words :

V.

"The jury are instructed that because a person can correspond with a friend or relative intelligently and carry on or attend to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will (but such evidence is competent and may be properly considered by the jury as tending to show that he has such sound and disposing mind). That in considering the question of his mental capacity they should take into consideration all the surroundings as disclosed by the evidence."

The prayer as offered is fully warranted by the case of Hodge *vs.* Fisher, Pet. C. C., 163, both on question of insanity of Thomson's relatives and opportunity of the witness.

It will also be seen by the modification the court struck out of the prayer, as asked by plaintiffs, the portion which allowed them in determing the question of testator's sanity, to take into consideration the age of the testator,

the insanity of his mother and uncle and the age at which they were affected, and gave no instruction whatever as to this vital part of the evidence for plaintiffs, namely, that insanity had existed in the mother and uncle of Thomson.

The uncontradicted evidence in the case for plaintiffs showed permanent insanity in the mother of Thompson for many years, and also in his uncle, and was uncontradicted, and it showed also that Thompson was well advanced in years at the time he was attacked. These matters were excluded from the consideration of the jury; they were important and bore upon the question whether or not Thompson's disease was of a permanent or temporary nature, especially as the evidence further showed that one of the causes of his insanity was old age (Manning, Rec., p. 37). There can be no doubt that this evidence was competent, and to refuse this instruction bearing upon same was error.

Underhill on wills, 144, Sec. 103.

In Baxter *vs.* Abbott, 7 Gray, 71 the court said:

> "With the fact that the father and mother, or either of them, had been insane, that the insanity had appeared in them about the same age, its existence in the child is rendered more probable and is believed upon less evidence.
>
> "The transmission of the predisposition to insanity is a matter of general observation and is recognized by the best medical authorities.
>
> "Esquirol says this hereditary taint is the most common of all the causes to which insanity can be referred."

Esquirol on Mental Diseases Transmitted, by Hunt, 49.

Beck Med. Juris. (10 ed.) 725.
Taylor Med. Juris. (Encyl.) 629.
Hays Med. Juris., Sec. 77.
Combe on Mental Derangement (Am. ed.) 96, who says that authors who differ on all other points agree on this.

In the case of Coughlin *vs.* Pulson, 2 McArth., D. C., 308, it was held competent to prove, in a case involving capacity to make a will, that the testator's relatives were insane.

We do not believe this proposition of law will be denied, for the evidence was admitted without objection, and the effect of the court's refusing to instruct the jury on that part of the evidence was to exclude it from consideration of the jury.

Reichenback *vs.* Reichenback, 127 Pa., 546, 589, holds that where insanity is shown a short time before will is made, burden should be placed upon proponent; and see Beaver *vs.* Springler, 93 Iowa.

In a will of real property the witnesses should not be absolute strangers to testator.

Swenmartin *vs.* Hancock, 6 Abb., N. C., N. Y., 266.

And further the cutting out of the remaining part of the prayer was improper.

It was shown by the evidence in the case that both of the subscribing witnesses to the alleged will were total strangers to Thomson; that only one of them had ever seen him before, and the other had seen him but on one occasion previously; under such circumstances there could have been no impropriety in the court calling the attention of the jury to the fact, as the law does not give

the evidence of such witnesses the same weight it would have given had they known the testator better.

Underhill on Wills, vol. 1, 117–118, note 2.

> "The opinion of a witness who is a stranger to testator and who sees or hears nothing except what is necessary to enable him to attest the instrument, is not as much to be relied upon as that of a neighbor and familiar acquaintance of the testator."

Garrison *vs.* Garrison, 15 N. J. Eq., 266.
Green *vs.* State, 88 Tenn., 614.

> "If subscribing witness is a stranger and has no opportunity to ascertain and judge of testator's capacity, his opinion is not entitled to as much weight as that of a friend who saw testator about same time and who was offered opportunity of conversing with him and testing the sanity of his mind."

Furner *vs.* Cheasman, 2 McCart., N. J., 243.
Garrison *vs.* Garrison, *supra.*
Hodge *vs.* Fisher, *supra.*

Nineteenth Assignment.

This assignment of error is based upon the refusal of the court to give the plaintiffs' sixth prayer of instruction.

The testimonian clause of the paper offered by the defendants and purporting to be a copy of the will of said Thomson, is in the following words:

> "In witness whereof, I, the said William Thomson, have to this my last will and testament, contained in two sheets of paper, *and to each sheet thereof, set my hand and seal this 24th day of February, 1886.*" (Rec., p. 25.)

And Lomer, one of the alleged subscribing witnesses, says—

> "the signature appeared twice upon same, namely, *at the foot of the first page and at the end of the will, on the second page.*"

Now, the question is, was it not incumbent upon the proponent of the will to show why this signature is not to be found upon the paper produced? It will be seen by the paper offered, if the first page of same was written on ordinary legal cap, it would contain the most vital part of the bequests, and it would have been a very easy matter to separate the two pages and insert any matter that was desired in place thereof. At least two-thirds of the contents must have been placed upon the first page.

> "If, on production of instrument, it appears to have been altered, it is incumbent upon the party offering it to explain its appearance."

Greenleaf on Ev., 16 ed. Sec., 564, notes 1 and 2, and Sec., 565.
Gregory *vs.* McPherson, 13 Cal., 573.
Bayres *vs.* Hamilton, 72 Ga., 568
Smith *vs.* United States, 2 Wall., 219.

> "To insure the identity of the instrument and to prevent the substitution of another without privity of the party concerned.
>
> "Courts of justice have not always adhered to that rule, but the decisions of recent date in the parent country show that her courts have returned to the old rule in all its full vigor."

Smith *vs.* United States, 2 Wall., 232.

In the case of Williams *vs.* Tyley, 1 Johnson Chancery Rep., Vice-Chancellor Sir W. Page Wood said :

> " So here the deceased having, in the witnessing clause at the end of his will, *expressly noted the circumstances of his having signed all the preceeding pages of his will, has made these signatures a part of his will ;* and having torn off the signatures from the first four pages, I hold and should have held the same, even if he had not struck his pen through the signatures of his name at the foot of the fifth and last page, that he has torn his will, within the meaning of the 20th section of the act."

Twentieth Assignment.

This assignment is based upon the court's refusal to grant the eighth prayer of the plaintiffs.

In the opening argument of the counsel for defendants it was said :

> " We expect to prove that this deed (referring to deed under which plaintiffs claimed title) lacks any consideration ; that it is the consummation of a conspiracy, and there is a title placed in some nominal individual to act as a scrapegoat of these people, who come here and try to force the old ladies out of their rights," etc. (Rec., p. 6.)

It will be noticed that the attorney for said defendants had stipulated with the defendants that the plaintiffs held 91-100 of the title of the heirs at law of said Thompson.

The plaintiffs objected to this line of statement, but the court allowed them to proceed, holding that when they were ready to offer evidence would be a proper time to dispose of the question.

No evidence whatever was offered to sustain the statement, and if it had been, it would have been entirely irrelevent and inadmissible for any purpose.

Who took the title to the property and what was the consideration for the deed in trust (Rec., p. 54) was no affair of the defendants. It did not tend to prove or disprove any issue in the case.

The plaintiffs, wishing to disabuse the mind of the jury of what had been said, requested said prayer, but the court refused to so instruct the jury. There being no evidence in the case, it was the duty of the court to give this instruction or the like in its charge; to refuse to do so was error.

> "No duty incumbent upon the judge of a trial court is more imperative nor more important to the fair and orderly administration of justice than that of interposing to restrain everything in the course of the trial that tends to mislead the jury and to direct their minds from the strict line of inquiry with which they are charged."
>
> Baltimore and Ohio R. R. *vs.* Boyd, 67 Md.. 32.
>
> "Where counsel exceeds limit allowed in argument, it is proper to ask suitable instructions to the jury with reference to it."
>
> Thomson on Trials, Sec. 957.
> Leonard *vs.* Hall, 133 Mass., 417.
> Jackson *vs.* State, 18 Tex. App., 586.
> N. Y. Life Ins. Co. *vs.* Baker, 94 U. S., 611.

The plaintiff asked for such instruction and it was refused:

"Where there is no evidence tending to prove a particular fact, the court is bound so to instruct the jury."

Greenleaf *vs.* Birth, 9 Pet. 292, appeal from the Circuit Court, D. C.

The judgment of the court below should be reversed and a new trial awarded.

Respectfully submitted,

HUGH T. TAGGART,
C. C. COLE and
LEO SIMMONS,
Attys. for Plaintiffs in Error.